In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1194

ENRIQUE PEREZ, PETITIONER

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INDEX

	Page
Docket entries	1
Information for robbery filed in the Sacramento Superior Court	3
Abstract of Judgment of the Sacramento Superior Court	4
Reporter's transcript on appeal, April 19, 1965 (excerpts)	6
Opinion—Fifth Appellate District	11
Opinion—California Supreme Court	23
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	36

PEREZ *vs.* CALIFORNIA No. 1194, October 1967

DOCKET ENTRIES

January 26, 1965	Sacramento Municipal Court	Complaint Filed
February 11, 1965	Sacramento Municipal Court	Held to Answer
February 16, 1965	Sacramento Superior Court	Information Filed
February 25, 1965	Sacramento Superior Court	Public Defender Appointed
March 3, 1965	Sacramento Superior Court	Arraignment
March 11, 1965	Sacramento Superior Court	Motion to Dismiss Denied
April 13, 1965	Sacramento Superior Court	Jury Trial
May 10, 1965	Sacramento Superior Court	Sentenced
May 10, 1965	Sacramento Superior Court	Notice of Appeal
July 2, 1965	District Court of Appeal (Third District)	Counsel Appointed
November 15, 1965	District Court of Appeal (Third District)	Appellants Opening Brief Filed
February 2, 1966	District Court of Appeal (Third District)	Respondent's Brief Filed
February 9, 1966	California Supreme Court	Transfer to Fifth District Court of Appeal
May 4, 1966	District Court of Appeal (Fifth District)	Opinion
May 18, 1966	District Court of Appeal (Fifth District)	Petition for Rehearing Filed
May 31, 1966	District Court of Appeal (Fifth District)	Petition for Rehearing Denied
June 10, 1966	California Supreme Court	Petition for Hearing Filed

DOCKET ENTRIES

June 29, 1966	California Supreme Court	Hearing Granted
July 8, 1966	California Supreme Court	Counsel Appointed
September 29, 1966	California Supreme Court	Ordered on Bank Calendar
November 1, 1966	California Supreme Court	Oral Arguments
November 3, 1966	California Supreme Court	Respondent Filed Additional Authorities
January 27, 1967	California Supreme Court	Opinion—Affirmed
February 27, 1967	California Supreme Court	Remitturer Issued

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SACRAMENTO

MINUTE ENTRY OF MAY 10, 1965

WILLIAM M. GALLAGHER
JAMES L. KERINS

Dept. 2

29010

PEOPLE *vs.* ENRIQUE PEREZ

Information for Robbery
Deft Found Guilty 4 Cts 1st Degree
Probation Hearing & Sentence

Deputy District Attorney A. NOLAND and defendant ENRIQUE PEREZ with his counsel T. CARROLL Deputy Public Defender. Present. This being the day fixed for hearing on probation and pronouncing of sentence upon defendant. The report of the Probation Officer being filed, the application for probation being considered by the Court, same is hereby DENIED. Counsel for the defendant made a motion for a new trial and IT IS ORDERED that the same be DENIED.

There being no legal cause why judgment and sentence should not be pronounced.

The Court Ordered that the defendant be confined in the California State Prison for the term prescribed by law for the crime of ROBBERY of the 1st Degree as charged in Counts,1,2,3 & 4 of the Information. Defendremanded to the Sheriff who is directed to deliver said defendant to the California Medical Facility at Vacaville, California

(Judgment Book 100 A—Judgment No. 908)

Upon motion of counsel for the defendant IT IS ORDERED that the Instructions—GIVEN and NOT GIVEN and the Argument be included the Transcript on Appeal, when it is made up.

DEPT. No. 2 CASE NO. 29010

In the Superior Court of the State of California

IN AND FOR THE COUNTY OF SACRAMENTO

ABSTRACT OF JUDGMENT

(Commitment to State Prison as provided by Penal Code Section 1213.5)

The People of the State of California,

vs

ENRIQUE PEREZ

Defendant.

Hon. WILLIAM M. GALLAGHER (Judge of Superior Court)

A. NOLAN (District Attorney)

T. CARROLL (Counsel for Defendant)

This certifies that on the 10th day of MAY, 19 65 judgment of conviction of the above-named defendant was entered as follows:

In Case No. 29010 Count No. 1,2,3 & 4 he was convicted by Jury (Court or Jury); on his plea of Not Guilty (guilty, not guilty, former conviction or acquittal, once in jeopardy, not guilty by reason of insanity); of the crime of ROBBERY of the FIRST DEGREE as to Counts 1,2,3 & 4 (designation of crime and degree, if any, including fact that it constitutes a second or subsequent conviction of same offense if that affects the sentence and if under Section 209 of the Penal Code whether victim suffered bodily harm)

in violation of 211 a of the Penal Code of the State of California (reference to Code or Statute, including Section and Sub-section);

with prior convictions charged and proved or admitted as follows:

DATE	COUNTY AND STATE	CRIME	DISPOSITION
Mar 5,1962	Sacramento,Calif.	Robbery -1st Degree	Calif.Youth Authority
Mar 5,1962	Sacramento,Calif.	Robbery -1st Degree	Calif. Youth Authority

Defendant was (was) or (was not) charged and admitted being, or was found to have been armed with a deadly weapon at the time of commission of the offense, or a concealed deadly weapon at the time of his arrest within the meaning of Penal Code Sections 969c and 3024.

908

CA-76 (REV.)

Defendant was not (was) or (was not) adjudged a habitual criminal within the meaning of Sub-division (a) or (b) of Section 644 of the Penal Code; and the defendant (is) or (is not) a habitual criminal in accordance with Sub-division (c) of that Section.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the said defendant be punished by imprisonment in the State Prison of the State of California for the term provided by law, and that he be remanded to the Sheriff of the County of Sacramento and by him delivered to the Director of Corrections of the State of California at the place hereinafter designated.

It is ordered that sentences shall be served in respect to one another as follows: (Note whether concurrent or consecutive as to each count) Consecutively as to Counts 1 and 2 ; Concurrently as to Counts 3 & 4

and in respect to any prior incompleted sentence (s) as follows: (NOTE whether concurrent or consecutive as to all incomplete sentences from other jurisdictions):

To the Sheriff of the County of Sacramento and to the Director of Corrections:

Pursuant to the aforesaid judgment, this is to command you, the Sheriff, to deliver the above-named defendant into the custody of the Director of Corrections at California Medical Facility--Vacaville,Calif. at your earliest convenience.

Witness my hand and seal of said court

this 10th day of MAY, 1965.

C.C. LA RUE County Clerk

by James L. Keene Deputy

SEAL

State of California, } ss.
County of Sacramento

I do hereby certify the foregoing to be a true and correct abstract of the judgment duly made and entered on the minutes of the Superior Court in the above entitled action as provided by Penal Code Section 1213.

Attest my hand and seal of the said Superior Court this 10th day of May 1965.

C.C. LA RUE, County Clerk - By James L. Keene Deputy
County Clerk and Ex-officio Clerk of the Superior Court of California in and for the County of Sacramento.

The Honorable: William M. Gallagher
Judge of the Superior Court of the State of California, in and for the County of Sacramento

NOTE: If probation was granted in any sentence of which abstract of judgment is certified, attach a minute order reciting the fact and imposing sentence or ordering a suspended sentence into effect.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

Crim. 10180

THE PEOPLE OF THE STATE OF CALIFORNIA, RESPONDENT

vs.

ENRIQUE PEREZ, APPELLANT

Filed June 24, 1965, By W. Kramer,
Clerk, Court of Appeal, 3rd District

REPORTER'S TRANSCRIPT ON APPEAL—April 19, 1968

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF SACRAMENTO

HON. WILLIAM M. GALLAGHER, JUDGE

APPEARANCES:

For the People:

THOMAS C. LYNCH, Attorney General of the State of California
Library Courts Building
Sacramento, California

For the Appellant:

ENRIQUE PEREZ, in propria persona

* * * * *

[fol. 444] TESTIMONY OF

ENRIQUE PEREZ, defendant, witness appearing on his [fol. 445] own behalf, having been previously sworn.

CROSS-EXAMINATION (Continued)

* * * *

[fol. 449] MR. CARROLL: I ask it be stricken.

THE COURT: It will be stricken.

Q (By Mr. Noland): Did your mother ever tell you they were looking for you two or three days prior?

A My mother said somebody—one morning somebody came looking for me. She didn't say who it was.

Q How did you know it was these two?

A I don't.

Q Did—were you at Sylvia Moreno's on the 13th with them?

MR. CARROLL: I will object to this as being beyond the direct.

THE COURT: Read the question back.

(Record read.)

MR. NOLAND: Your Honor, I don't believe under the—

THE COURT: (Interposing) I'm going to sustain it. Specify the time you were speaking of.

Q (By Mr. Noland): All right. This is around 1:00, 1:30 in the morning on Wednesday, the 13th of January, 1965. Weren't you at Sylvia Moreno's with David Perez and Joe Jordan?

MR. CARROLL: I would object to this question as being beyond the scope of direct-examination.

MR. NOLAND: If I—

[fol. 450] THE COURT: (Interposing) Just one moment. It's beyond the scope of direct-examination.

MR. NOLAND: Under the—

THE COURT: (Interposing) What is the purpose of your question?

MR. NOLAND: What is the purpose of my question? Putting them together a few moments after the robbery of Ralph's Bar.

THE COURT: Beyond the scope of direct-examination. Objection sustained.

MR. NOLAND: Those are direct acquaintances with them, and his mother brought it up.

THE COURT: Yes. On that day there is considerable testimony, but on the date of this specific alleged crime there was nothing elicited on direct-examination on that day, or pertaining to their association on that day.

MR. NOLAND: I understand it's up to the Court to decide how the direct was, but it is material.

THE COURT: Well, the reason I sustained it is because there are separate crimes being tried together. There is no direct testimony bearing on this one from this witness. Objection sustained.

Q (By Mr. Noland): You purchased—strike that.

Your Honor, also these items of clothes were bought prior to this time, and found there later. I don't see how we can take a section of time out of the middle of this thing and say that people can't cross-examine him on it [fol. 451] because of the relating matters. As far as the clothing is concerned, having been bought prior to the 13th and left there, found on the 15th, and the People's theory of the case is—

THE COURT: (Interposing) You are only permitted to cross-examine this witness regarding testimony within the limits that he gave on direct-examination.

MR. NOLAND: All right.

THE COURT: That's the rule of law.

* * * *

[fol. 457] MR. NOLAND: Ladies and gentlemen, he takes the stand and says, "I didn't want to admit these things until you prove them to me." He also says and takes the stand and testifies about an alibi on the 3rd, an alibi on the 15th, which limits the People, and they may confuse you and say, "Why didn't Mr. Noland ask him that?" Well, the law restricts me on what I can ask him. If he doesn't mention it on cross-examination, I can't—I mean, on direct-examination—

MR. CARROLL: (Interposing) Your Honor, I would object.

MR. NOLAND: I can't get it on cross-examination.

MR. CARROLL: I would object to this line of argument. I believe that is a comment that is far beyond—the State of California makes the exception in the recent case of Modesto.

THE COURT: You will restrict your comment, counsel, to within the law, and—however, he may make comment on the facts in evidence in this case, and on the evidence that was elicited, and that which was not elicited is not fair comment.

MR. CARROLL: I realize that, your Honor.

[fol. 458] THE COURT: All right. Proceed.

* * * *

[fol. 461] MR. NOLAND: They were together minutes after the Ralph's robbery at the place where all of these items, paraphernalia that were used in the robbery were found, and in spite of this the defendant doesn't say a word about it on the stand. He won't explain it to you. So Sylvia Moreno's testimony stands unexplained and uncontradicted, and as I have already told you, I cannot cross-examiner because he chose to sit silent. The same as if he did not take the stand on that particular count. But the Court will instruct you that you may consider those things that you feel that he should have given an explanation to, you may consider that in weighing the evidence—the testimony as to whether it is more probable that he was telling the truth, or Sylvia Moreno is telling the truth about them being together, or the conclusions that you can deduct therefrom that are either favorable or unfavorable to him.

So let's do it again. Sylvia Moreno puts them together after the Ralph's Market. Not just out in the street somewhere, but together where two days later the officers found all of this robbery equipment. Guns, hats, coats, and things, and the defendant doesn't choose to talk about it on the stand or give you any explanation.

Now, ladies and gentlemen, the defendant has admitted to you that—he only tells you what he wants you to know. He said that on the stand. He says, "I don't talk about the forgeries. I didn't tell the police about the for-

[fol. 462] geries. I didn't want them to know about the forgeries." There are objections to them coming into

evidence here. Objection to the license number and that evidence, and all these things come in over strenuous objections, and I'm trying to fight all the way. Anyway, they are put before you in spite of these objections. Oh, he says, "Yes, I admit those." He selects what he wants to testify about on the stand, to give you only half of the story, or part of the story. He won't tell you all the story there. He has been convicted of an armed robbery before, which the Court will instruct you does have bearing. If you—in other words, you may consider that as to whether or not you believe anything he says, the fact that he has a prior conviction. So I say that you cannot believe what he has told you at all because of his selective testifying. His admitting to you that he tells you only what he wants you to know, and the fact that he has this prior conviction.

* * * *

[fol. 524] THE COURT: It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more [fol. 525] probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to drawn an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

* * * *

IN THE DISTRICT COURT OF APPEAL
FIFTH APPELLATE DISTRICT
STATE OF CALIFORNIA

5 Crim. No. 245

THE PEOPLE, PLAINTIFF AND RESPONDENT

v.

ENRIQUE PEREZ, DEFENDANT AND APPELLANT

Filed May 4, 1966, James G. Huggins, Clerk

OPINION

APPEAL from a judgment of the Superior Court of Sacramento County. William M. Gallagher, Judge. Affirmed as to Counts 1 and 2; reversed as to Counts 3 and 4.

Peter G. Fetros for Defendant and Appellant.

Thomas C. Lynch, Attorney General, Raymond M. Momboisse, Deputy Attorney General, and Theodore T. N. Slocum, Deputy Attorney General, for Plaintiff and Respondent.

The defendant, Enrique Perez, was accused of a whole saturnalia of crime in Sacramento. The information under which he was convicted alleged two previous felony convictions for robbery in the first degree committed in March of 1962; they were ultimately admitted by the plea of the defendant. The charges of present crime were stated in four separate counts: the first alleged robbery of $50 from Fred Fauble, the bartender at the Viking Club, on the 3rd day of January, 1965; the second charged robbery of James Monahan at the Corner Market in Sacramento County on January 15, 1965, and the abstraction of $77, a brown leather wallet, and a G. E. radio; counts 3 and 4 grew out of the robbery of Ralph's Bar in Sacramento; count 3 involved the taking of an undetermined amount of money from Ralph's Bar in the lawful possession of the bartender, Ray Biner; and count 4 referred

to money stolen from a guest of the bar, Eli Dragash, on the same date, January 13, 1965. Each of the four counts charged that the defendant was armed with a deadly weapon, to wit: an automatic pistol. The jury brought in a verdict of guilty as to all four charges. It is noteworthy that one David Perez, not related to Enrique, admitted participation in the robberies of the Corner Market and Ralph's Bar by pleading guilty.

The defendant appealed from "the final judgment and sentence made and rendered in said Superior Court on May 10, 1965, and from the whole thereof." This appeal is to be treated as a single appeal from the four counts covered by the judgment. (*People* v. *McDonough*, 198 Cal.App.2d 84, 86-87.)

Appellant presents three arguments for reversal, saying:

(1) That it was prejudicial error for the court and the prosecuting attorney to comment on the failure of the appellant to testify regarding certain counts of the information (*Griffin* v. *State of California*. 380 U.S. 609); (2) that the court committed prejudicial error by allowing evidence concerning the alleged robbery by the defendant of the Modern Variety Store, a crime which was not charged in the information, but which, according to the People, showed plan, design, and characteristic pattern of criminal activity; and (3) that, as a matter of law, there was insufficient evidence to sustain convictions on counts 3 and 4 of the information.

We shall treat these contentions in inverse order. The evidence very clearly establishes the propriety of the conviction on count 1 (the Viking Club robbery), in connection with which the defendant left his fingerprints at the scene of the crime, and on count 2 (the Corner Market robbery), in which there was identification of the defendant as a participant in the crime by eyewitnesses.

Count 1 alleged the robbery on January 3, 1965, of the Viking Club at 1445 33rd Street in Sacramento, at which time $325 in cash, a Shell credit card, and a BankAmericard were stolen. Frederick Fauble was working on the premises as the bartender. One of the participants was

dark complexioned with dark hair and was armed with a small automatic pistol; the other robber was described as being blonde and light skinned; the darker-skinned criminal held a gun on Fauble and ordered him to lie on the floor.

Appellant took the stand and denied the robbery, saying that he had been with his brother, Miguel, and a friend, Joseph Rosales, from 7:30 p.m. on January 3, until 1 a.m. on January 4; this claim was supported by testimony of the brother and of Mrs. Joseph Rosales, but was rejected by the jury.

Enrique Perez admitted that he had made numerous purchases by using the BankAmericard stolen from Fred Fauble, but claimed that he had been given this card in early January by one Robert Gomes, after originally trying to sell it to him; when he used the card he signed the name "Fred Fauble" as buyer.

Among the purchases made by the defendant with the stolen BankAmericard on days closely following the robbery were the following:

On January 4, 1965, it was used to purchase a $24.95 watch from the Ben Franklin Store in Davis; on the same day, the stolen card was used at the IXL, Inc. store at 804 "J" Street in Sacramento, to purchase a pair of black imitation leather gloves similar to those received in evidence; on January 4, 5, or 6, 1965, Fauble's card was used at Devlin's Shoe Den, 1007 11th Street, Sacramento, to purchase the pair of shoes which appellant was wearing in court at the time of the trial; on January 5 and 7, 1965, the credit card was used to purchase gasoline at two different Shell service stations in the Sacramento area for appellant's vehicle bearing license number LDT 141; on January 7, 1965, a black, narrow-brimmed hat was bought from Jim Patterson's Men's Store, 9th and "K" Streets, Sacramento.

Count 2 involves the robbery of the Corner Market at 1700 "V" Street, Sacramento. James Monahan, the store-owner, and his wife were the victims. Appellant took the witness stand in his own behalf and testified to an alleged alibi, which was rejected by the jury. This robbery oc-

curred at about 7 p.m. David Perez was the "heavy set" robber armed with an automatic pistol, who confessed to this crime and also to the holdup of Ralph's Bar. Appellant, the smaller robber with a lighter build, carried an "odd looking," revolver with a "hexagonal" barrel. Both participants wore dark coats and black gloves, probably leather, dark narrow-brimmed hats, and dark pants.

Each of the men held a glove or cloth up to his face during most of the time so that his nose and mouth were covered. Appellant had his hat pulled down to the level of his eyebrows; he went to the counter with gun in hand and said, "This is a stick-up," and he made Mrs. Monahan put all the money from the cash register into a paper bag. Mr. Monahan was ordered to hand over his wallet which contained $14 to $17. The storekeeper testified that appellant said "to drop our hands and not make a move, or not to look at him or he would kill us."

When the appellant walked behind the counter, he dropped the covering from his face, and the Monahans got a momentary full face view. He took Mrs. Monahan's radio from the counter beneath the cash register, and left the store with his partner, David. Besides stealing the radio, the robber took $69 in cash.

Each of the Monahans, in open court, identified appellant as the shorter of the two robbers who held them up.

Counts 3 and 4 are concerned with the robbery of Ralph's Bar at 1730 16th Street in Sacramento, and of a customer there, one Eli Dragash. Here, there was no evidence of fingerprints or of personal identification; the verdicts on counts 3 and 4 depend on circumstantial evidence. There were three participants; they took coins and bills from the cash register; one of the robbers was a large man with a "football-type" build, and the other two were smaller. David Perez, the large man, pleaded guilty to both the Ralph's Bar robbery and the Corner Market robbery; he was wearing a white Halloween mask over the lower part of his face at Ralph's Bar. Neither the bartender nor Dragash was able to look at the faces of the shorter men. Dragash, who was partly blind, testified as to some of the items of clothing worn by one of the participants and the weapon used in the crime.

A criminal conviction will ordinarily not be reversed on insufficiency of the evidence unless it is clear to the appellate court that there is not sufficient substantial evidence, upon any hypothesis, to support the verdict. (*People* v. *Newland*, 15 Cal.2d 678, 681; *People* v. *Hickok*, 230 Cal. App.2d 57, 59.) The jury was in a position to view the witnesses who testified and to weigh the evidence both direct and indirect leading to their verdict, and "[t]his court may not disturb such finding or the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction." (*People* v. *Farrington*, 213 Cal. 459, 463-464.)

The appellant contends that the evidence in support of the convictions on counts 3 and 4 (Ralph's Bar) merely raises a suspicion of guilt. However, the record does contain substantial, even though circumstantial, evidence supporting the jury's finding on those two counts. It was stipulated that David Perez was one of the robbers—the one who was said to have had a "foot-ball player" physique. Enrique Perez was with David Perez at Sylvia Moreno's apartment, which was located approximately three blocks from Ralph's Bar, at about 1 or 1:30 a.m. on January 13, 1965; that was just before or just after the robbery. Eli Dragash stated the approximate weight and height of one of the shorter robbers and Ray Biner, the bartender, also estimated the height of one of them; the jury, of course, had a full opportunity to observe appellant. Eli Dragash testified that one of the shorter robbers wore a hat, mask, and a three-fourths length coat and also that he carried a .38 revolver. This dress was identical with, or at least markedly similar to, that worn by appellant in the Corner Market robbery, which took place two nights later in virtually the same neighborhood. The weapons used by the robber in both places were apparently identical in size and shape.

Mr. Dragash was ordered to lie down by one of the shorter robbers, and he was then "frisked." Similarly, in the Viking Club holdup, one of the two relatively short robbers ordered his victim, Fred Fauble, to lie down and he then took Fauble's credit card and other personalty. In the Viking Club robbery, Enrique Perez was certainly

a participant because his fingerprints were found on a cigar box, which he had handled.

While there is difficulty in relying upon this circumstantial evidence, we would not feel justified in interfering with the jury's determination in this case as to counts 3 and 4, except for the violation of the rule set forth in *Griffin* v. *State of California*, *supra*, 380 U.S. 609, 614, as hereinafter discussed.

Appellant next argues that it was prejudicial error to permit evidence of the robbery of the Modern Variety Store in Sacramento on November 10, 1964, allegedly by defendant and another person, as that crime was not charged in the information. Of course, a defendant cannot be tried for any offense other than that specified in the indictment or information (*People* v. *Albertson*, 23 Cal.2d 550, 576), and evidence of collateral crimes is not admissible, except when such evidence is material to the issues before the court. (*People* v. *Brown*, 168 Cal.App.2d 549, 553; *People* v. *Sanders*, 114 Cal. 216, 230.) In this connection, evidence of other crimes may be admitted to show plan, scheme, system, design, or a characteristic pattern of criminal activity by the accused. (*People* v. *Houston*, 219 Cal.App.2d 187, 192-193; *People* v. *Rosoto*, 58 Cal.2d 304, 330; *People* v. *Mims*, 160 Cal.App.2d 589, 597; *People* v. *Peete*, 28 Cal.2d 306, 314-315.)

People v. *Gay*, 230 Cal.App.2d 102, 104, holds that the admissibility of evidence of this type is, generally speaking, a question for the trial court.

The collateral offense allegedly committed by the defendant at the Modern Variety Store has notable similarities to one or more of the four robberies for which appellant was on trial. In the crimes charged in the information as in the Modern Variety Store offense, the robbers were masked in various ways. At Ralph's Bar and the Corner Market, one robber was the taller. In the Viking Club and Corner Market incidents, one robber, short in stature, wore a dark coat or jacket. As in the robberies of Ralph's Bar and the Corner Market, the shorter criminal wore a narrow-brimmed hat and carried a revolver.

In the robberies of Ralph's Bar and the Corner Market and also in the Modern Variety Store holdup, the larger

robber gave the major orders to his victims. In several of the offenses charged, the shorter robber carried on most of the activity involved in gathering the loot. In the Modern Variety Store holdup it was the shorter criminal who went behind the counter, cleared out the currency in the cash register and searched for the money orders. In the Viking Club and Ralph's Bar holdups, a robber of limited height moved the victims out from the bar, made them lie down, and then "frisked" them. In the Corner Market and Viking Club crimes, a short participant went behind the bar and rummaged through the items there in search of something of value in addition to cash.

As in the Modern Variety Store robbery, the perpetrators of the Viking Club and Corner Market holdups sought to steal more than cash. At the Modern Variety Store robbery, they took money orders which they obviously hoped to negotiate. In the Viking Club affair, the participants stole two credit cards from the victim and afterwards used one card repeatedly to buy various articles. In the Corner Market holdup, the shorter robber closely investigated the counter near the cash register and removed Mrs. Monahan's radio. In the Ralph's Bar holdup, the robbers "frisked" their victims and found that the bartender had no wallet and the partly blind customer had only six dollars; but one robber looked around the cash register for other types of property, moving cigar boxes as he did so.

Enrique Perez was implicated in the crime at the Modern Variety Store by his confession to Richard Bostic in his apartment at San Francisco that he had acquired the personal property that day in a Sacramento robbery. Appellant was implicated in the Viking Club robbery by leaving his fingerprints at the scene of the crime and through the use by him afterwards of the stolen Bank-Americard. He was implicated in the Corner Market holdup by eyewitness identification by two of his victims.

The record in its totality substantiates that the Modern Variety Store robbery was similar in significant respects to one or more of the four offenses charged in the information. In admitting proof of the collateral offense, the trial judge, after holding an extensive hearing of the

question out of the jury's presence, cannot be held to have abused his discretion.

Finally, appellant contends that the ruling of the United States Supreme Court in *Griffin* v. *State of California*, *supra*, 380 U.S. 609, 614, requires a reversal. Both the deputy district attorney in his argument and the trial court in its instructions followed the authorization apparently given by the California Constitution (art. I, § 13), and stated to the jury that, while a defendant did not have to take the stand, still, if he did not do so and thereupon try to explain facts of which he must have had knowledge, an adverse inference might be indulged against him. The *Griffin* case holds that a state may not constitutionally permit either a judge or a prosecutor to comment in a criminal action upon a failure of the defendant to testify (U.S. Const., 5th and 14th Amends.). In the *Griffin* case, the trial judge had instructed the jurors that they might consider the defendant's failure to take the stand, and that among the inferences they could draw therefrom, those unfavorable to the defendant were the more probable. Prior to the issuance of that opinion, it had been assumed by the court that the Fifth Amendment prohibited any such comment in federal courts, but that the Fourteenth Admendment did not make the Fifth Amendment applicable in that respect to state trials. (*Adamson* v. *State of California*, 332 U.S. 46.) However, *Malloy* v. *Hogan*, 378 U.S. 1, overruled *Adamson* v. *State of California*, to the extent of making the privilege to remain silent applicable to defendants in state trials; and the *Griffin* case held that the Fifth Amendment "commands the no comment rule" in cases like the present. (See Mishkin, The Supreme Court 1964 Term, 79 Harv. L.Rev. 56, 159-160.)

In the majority opinion, Mr. Justice Douglas suggested that there are many reasons besides guilt which might lead a defendant to decide not to testify; he quoted with approval the following excerpt from Mr. Justice Field's opinion in *Wilson* v. *United States*, 149 U.S. 60, 66:

> "It is not every one who can safely venture on the witness stand, though entirely innocent of the charge

> against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be witnesses, particularly when they may have been in some degree compromised by their association with others, declares that the failure of a defendant in a criminal action to request to be a witness shall not create any presumption against him."

To the argument that a jury would inevitably draw such inferences anyway from a defendant's failure to take the stand, Justice Douglas replied:

> "What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."

The *Griffin* case unquestionably applies to the instant action and it warrants a reversal: (1) unless by taking the witness stand and testifying with respect to two of the counts, the defendant waived the constitutional privilege as to all of them, or (2) unless the error was not prejudicial by reason of article VI, section 4½ of the California Constitution. (*People* v. *Bostick*, 62 Cal.2d 820, 823; Witkin, California Criminal Procedure, 1965 Supplement, § 497A, p. 106; § 762A, pp. 141, 142.)

Was there a total or only a partial waiver here of the constitutional right granted by the Fifth Amendment in that Perez did testify as to the charges contained in counts 1 and 2 but did not give evidence with respect to counts 3 and 4? In *Redfield* v. *United States*, 315 F.2d 76 (cert. denied 369 U.S. 803) at page 80, it is said:

". . . the privilege against self-incrimination is one which may be waived (*Hashagen* v. *United States*, 9 Cir., 283 F.2d 345), and such a waiver occurs when a defendant elects voluntarily to testify. *Raffel* v. *United States*, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054."

(See *Dyson* v. *United States*, 283 F. 2d 636, 637.)

In *Johnson* v. *United States*, 318 U.S. 189, 195-196, the United States Supreme Court, speaking through Mr. Justice Douglas, held that in a proper case the privilege against self-incrimination granted by the Fifth Amendment could be waived:

"The case of an accused who voluntarily takes the stand and the case of an accused who refrains from testifying (*Bruno* v. *United States*, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257) are of course vastly different. *Raffel* v. *United States*, 271 U.S. 494, 46 S.Ct. 566, 70 L.Ed. 1054. His 'voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all.' 8 Wigmore, Evidence (3d ed., 1940) § 2276 (2). . . . As stated by this Court in *Caminetti* v. *United States*, 242 U.S. 470, 494, 37 S.Ct. 192, 198, 61 L.Ed. 442, L.R.A. 1917F, 502, Ann.Cas. 1917B, 1168, an accused who takes the stand 'may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.' But where the claim of privilege is asserted and unqualifiedly granted, the requirements of fair trial may preclude any comment."

(See *People* v. *Clapper*, 233 Cal.App.2d 34.)

In *Caminetti* v. *United States*, 242 U.S. 470, 494, the United States Supreme Court also said:

"The accused, of all persons, had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the

witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him."

In the instant case, when appellant Enrique Perez took the stand to testify in his own behalf, all of the People's accusations relating to his participation in the four offenses charged had been admitted in evidence. His counsel did not state that the defendant would take the stand only for a limited purpose. But it is now claimed by his counsel that he selectively asserted a privilege against self-incrimination by testifying only as to counts 1 and 2 and remaining completely silent about the charges contained in counts 3 and 4.

The People, on the contrary, contend that the defendant must be deemed to have waived his privilege against self-incrimination as to all counts and that he thus lost any right to have his conviction reversed on the basis of the *Griffin* rule as to any count. We cannot agree with this conclusion of the Attorney General. The constitutional privilege against self-incrimination, in our opinion, applies in full force to each of the separate crimes alleged in an information.

We must, therefore, inquire whether these error of the court and the prosecuting official were prejudicial as to the convictions on counts 3 and 4 within the meaning of article VI, section 4½ of the California Constitution. (*People* v. *Bostick*, *supra*, 62 Cal.2d 820, 823; *People* v. *Steele*, 235 Cal.App.2d 798, 814; Witkin, California Criminal Procedure, 1965 Supplement, § 497A, p. 106; § 762A, pp. 141-142.)

As already pointed out, the evidence proving count 1 (Viking Club) and count 2 (Corner Market), when viewed most strongly in favor of the respondent, as we must after conviction, differs markedly from the evidence separately

considered on counts 3 and 4 (Ralph's Bar); there is strong proof of guilt as to the first two counts, including fingerprints in one and specific identification by two witnesses in the other. On the last two counts, however, there is no such overwhelming evidence, and the showing of guilt is questionable. The test to be applied in measuring the effect of *Griffin* case errors is whether it is ". . . reasonably probable that a result more favorable to defendant would have been reached in the absence of the error arising from the argument of the prosecution and the giving of the instruction on the subject of defendant's failure to testify." (*People* v. *Keller*, 234 Cal.App.2d 395, 399.) With respect to counts 1 and 2, we necessarily determine that the evidence would have compelled conviction irrespective of the errors, but we are forced to reach an opposite conclusion as to the weaker showing on counts 3 and 4; accordingly, the convictions on these two latter counts must be reversed.

The judgment is affirmed as to counts 1 and 2 of the information and reversed as to counts 3 and 4.

/s/ Conley
P.J.

I Concur:

/s/ Stone
J.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

Crim. 10180

THE PEOPLE, PLAINTIFF AND RESPONDENT

v.

ENRIQUE PEREZ, DEFENDANT AND APPELLANT

Filed Jan. 27, 1967, William I. Sullivan, Clerk

SEE DISSENTING OPINION

A jury found Enrique Perez guilty on four counts of first degree robbery (Pen. Code, § 211a.) He admitted two prior first degree robbery convictions. A motion for a new trial was denied, and he appeals from the judgment, contending that evidence of a prior robbery was improperly admitted; that the evidence is insufficient to support his conviction on counts 3 and 4; and that he did not waive his federal constitutional privilege against self-incrimination as to two of the robberies charged by testifying on direct examination as to the other robberies charged and therefore error was committed of the type condemned in *Griffin* v. *California*, 380 U.S. 609.

Count 1 (January 3, 1965, robbery at the Viking Club):

About 9 p.m. on January 3, 1965, two men entered the Viking Club in Sacramento. One of them was armed with a revolver and had a glove over his mouth. After informing the bartender, Frederick Fauble, that "this was a holdup," the robbers took $325, a Bankamericard, and a Shell credit card. Defendant's fingerprints were found on a cigar box that was knocked off a shelf by one of the robbers.

Defendant admitted using the stolen Bankamericard to make various purchases and signing Fauble's name to the sales slips. He testified that one Robert Gomes gave him the card in early January after trying to sell it to him. Defendant denied having been in the Viking Club on the

night of the robbery and testified that he was with his brother, Miguel, and a friend, Joseph Rosales, when the robbery was committed. His alibi was supported by testimony of Miguel and Mrs. Joseph Rosales.

Count 2 (January 15, 1965, robbery at the Corner Market):

About 7 p.m. on January 15, 1965, David Perez (who is not a relative of defendant) and a second man entered the Corner Market in Sacramento. Each man carried a gun and held a glove or cloth over his face covering his nose and mouth. The men demanded money from Mr. and Mrs. James Monahan, who operated the store, and took from them about $69 and a radio. Mr. and Mrs. Monahan identified defendant at the trial as the second robber. They had a momentary full face view of him on one occasion during the robbery when he dropped the covering from his face.

Defendant testified that he was at his home when the Monahans were robbed, and his alibi was supported by testimony of his brother Miguel and his mother.

Counts 3 and 4 (January 13, 1965, robberies at Ralph's Bar):

About 1:15 a.m. on January 13, 1965, David Perez and two other men entered Ralph's Bar, which was in the same general neighborhood as the Corner Market. One of the men carried a revolver. David Perez wore a mask, and one of his companions used a handkerchief as a mask. Ray Biner, the bartender, and Eli Dragash, a patron who was partially blind, were in the bar. The robbers took $6 from Dragash and the money in the cash register. Biner and Dragash were unable to see the faces of the men who accompanied David Perez but described the height and weight of one of his companions, and the jury, of course, had an opportunity to observe defendant.

Defendant was with David Perez at the apartment of David's sister, Sylvia Moreno, about three blocks from Ralph's Bar at 1 or 1:30 a.m. on January 13, 1965, which was just before or after the robbery at that bar. The

weapon used by defendant at the Corner Market robbery, clothing worn by him at that robbery, the stolen radio, and a coat worn by one of David Perez's companions at the Ralph's Bar robberies were found at Mrs. Moreno's apartment.

Prior Collateral Robbery

At 6:45 p.m. on November 10, 1964, two men entered the Modern Variety Store in Sacramento. Both wore stockings that covered their faces, and one carried a rifle. William George, the owner of the store, was working there that evening. The robbers took currency from the cash register, money orders, and a check protector. Some of the stolen money orders were later negotiated.

Items stolen in the Modern Variety Store robbery were left by defendant and one David Hunt at the home of an acquaintance. Defendant stated at that time that they got the items in a holdup in Sacramento.

Defendant objected at the trial to the admission of the evidence of the prior robbery, and the trial court, before admitting the evidence, held proceedings outside the jury's presence at which the court was informed what evidence would be introduced and heard arguments on the matter.

"It is settled in this state that except when it shows merely criminal disposition, evidence which tends logically and by reasonable inference to establish any fact material for the prosecution, or to overcome any material fact sought to be proved by the defense, is admissible although it may connect the accused with an offense not included in the charge." (*People* v. *Henderson*, 60 Cal.2d 482, 494-495; *People* v. *Woods*, 35 Cal.2d 504, 509; see also *People* v. *Coefield*, 37 Cal.2d 865, 869.) Here the evidence of the prior robbery was relevant on the issue of the identity of defendant as a perpetrator of the robberies charged. The evidence of the prior robbery disclosed a plan, pattern, and modus operandi similar in many respects to those used in the robberies charged. In the prior offense, as in each of the offenses charged, the place robbed was a business establishment in Sacramento, the robbery was committed during the evening or early morning hours, two or three men participated in the robbery, one or more

of the robbers wore a mask, a gun was used in committing the robbery, and no victim was physically injured. It further appears that in the prior robbery and all the robberies charged, except those at Ralph's Bar, property in addition to money was taken, that the Bankamericard taken in the Viking Club robbery was later used by defendant, and that the money orders taken at the prior robbery were likewise later used apparently by one of the robbers.

In view of the striking similarities between the prior offense and the ones charged we are satisfied that the trial court did not abuse its discretion in admitting the evidence. (*People* v. *Adamson*, 225 Cal.App.2d 74, 78 et seq; *People* v. *Renchie*, 217 Cal.App.2d 560, 563; *People* v. *McCarty*, 164 Cal.App.2d 322, 325-327.) There were factual differences between the prior robbery and the ones charged, such as that at the robberies at the Viking Club and Ralph's Bar, unlike the prior robbery, the victims were made to lie on the floor, but it was, of course, unnecessary to prove the prior offense identical in every detail with the crimes charged in order to render evidence of the prior offense admissible. (*People* v. *Rosoto*, 58 Cal. 2d 304, 330; *People* v. *Renchie*, *supra*, 217 Cal.App.2d 560, 563.)

We are satisfied that the evidence is sufficient to support the jury's verdict on each count.

As we have seen, on direct examination defendant gave an alibi with respect to the robberies charged in counts 1 and 2. He did not refer on direct examination to the robberies charged in counts 3 and 4 or the collateral robbery. On cross-examination the prosecution asked a question directed to show that defendant was with David Perez a few moments after the robberies charged in counts 3 and 4, and an objection on the ground that the question was beyond the scope of direct examination was sustained. No questions were asked on cross-examination regarding the collateral robbery. In the closing argument the prosecution made comments on defendant's failure to explain or deny the evidence of his guilt as to counts 3 and 4. The trial court gave an instruction permitting the jury to draw an inference adverse to defendant from his fail-

ure to explain or deny facts within his knowledge.[1] After the verdict was returned the United States Supreme Court rendered its decision in *Griffin* v. *California*, *supra*, 380 U.S. 609, and defendant argues that under that decision the argument and instruction were improper.[2]

In *People* v. *Ing*, —— Cal.2d ——, ——, we stated that *Griffin* v. *California*, *supra*, 380 U.S. 609, "held that the California constitutional provision permitting comment on the failure of the defendant to testify (Cal. Const., art. I, § 13) violated the Fifth Amendment privilege against self-incrimination made applicable to the states in *Malloy* v. *Hogan*, 378 U.S. 1. *Griffin* further declared that 'the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.' (See also *Malloy* v. *Hogan*, *supra*, at p. 11.) In *Griffin* the defendant had not taken the stand, whereas here defendant testified in his own behalf, and it is necessary to consider to what extent he thereby waived his privilege against self-incrimination.

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[1] The instruction read: "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt."

[2] The *Griffin* rule is applicable to cases pending on direct appeal at the time it was announced. (See *Tehan* v. *Shott*, 382 U.S. 406, 409, fn. 3; *Johnson* v. *New Jersey*, 384 U.S. 719, 732.)

"Under federal decisions a defendant who takes the stand and testifies in his own behalf waives his Fifth Amendment privilege against self-incrimination at least to the extent of the scope of relevant cross-examination. (*Johnson* v. *United States*, 318 U.S. 189, 195; *Caminetti* v. *United States*, 242 U.S. 470, 494; *Powers* v. *United States*, 223 U.S. 303, 314-316; *Sawyer* v. *United States*, 202 U.S. 150, 165-166; *Fitzpatrick* v. *United States*, 178 U.S. 304, 314-316; *Ziegler* v. *United States*, 174 F.2d 439, 446-447; *Branch* v. *United States*, 171 F.2d 337, 338; *Carter* v. *United States*, 19 F.2d 431, 434; see *Brown* v. *United States*, 356 U.S. 148, 154; *DeRose* v. *United States*, 315 F.2d 482, 487.) It matters not that the defendant's answer on cross-examination might tend to establish his guilt of a collateral offense for which he could still be prosecuted. (*Johnson* v. *United States*, *supra*, 318 U.S. 189, 192 et seq.; *Carpenter* v. *United States*, 264 F.2d 565, 569; see McCormick on Evidence (1954), p. 275.)"

As we have seen, on direct examination defendant testified to an alibi with respect to counts 1 and 2 and thus in effect denied the offenses charged in those counts. Cross-examination as to the collateral offense, which disclosed a plan, pattern, and modus operandi similar in many respects to those charged, would have been proper. (*People* v. *Ing*, *supra*, —— Cal.2d ——, and authorities cited therein.) Cross-examination as to the robberies charged in counts 3 and 4 likewise would have been proper. Those robberies, like the collateral robbery, disclosed a plan, pattern, and modus operandi similar in many respects to those charged in counts 1 and 2.

The fact that defendant was then on trial for the robberies charged in counts 3 and 4 does not preclude a determination that the waiver extends to those offenses. To hold otherwise would permit a defendant to withdraw from the crossfire of interrogation before the reliability of his testimony has been fully tested. It is also of importance that the reasons advanced for the privilege are decisively less persuasive when applied to disclosures requested after the accused has voluntarily taken the stand. (See 8 Wigmore on Evidence (McNaughton rev. 1961) § 2276, p. 462.)

In our opinion it was not a violation of the federal constitutional privilege against self-incrimination for the prosecutor to argue and the court to instruct that an inference unfavorable to defendant could be drawn from his failure to explain or deny facts within his knowledge relating to counts 3 and 4 or to the collateral offense. The trial court's instruction was general in terms and permitted the jury to draw an inference unfavorable to defendant from his failure to deny or explain any matters within his knoweldge, but no claim is made that there was any additional matter beyond the scope of relevant cross-examination that defendant failed to explain or deny.

No contention is made that the argument or instruction violated the state constitutional privilege against self-incrimination (Cal. Const., art. I, § 13), nor could such a contention properly be made in the present case. A defendant by testifying in his own behalf waives his state constitutional privilege against self-incrimination to the extent of the permissible scope of cross-examination (*People* v. *Ing*, *supra*, —— Cal.2d ——, and authorities cited therein). Cross-examination with respect to the collateral offense would have been proper under California decisions (*People* v. *Ing*, *supra*, —— Cal.2d ——, and authorities cited therein). Cross-examination as to the robberies charged in counts 3 and 4, which, as we have seen, disclosed a plan, pattern, and modus operandi similar in many respects to those charged in counts 1 and 2, likewise would have been proper.

The judgment is affirmed.

BURKE, J.

WE CONCUR:

TRAYNOR, C.J.

McCOMB, J.

TOBRINER, J.

MOSK, J.

PEOPLE

v.

PEREZ

Crim. 10180

DISSENTING AND CONCURRING OPINION

I concur in part and dissent in part.

The practical effect of the majority opinion is that the prosecution by joining charges of separate and distinct robberies can effectively compel the defendant to testify as to all charges or be subject to adverse inferences where he elects to testify as to one and there is evidence, however weak, from which it can be concluded that the robberies disclose a common plan, pattern, or modus operandi. If this is the law what becomes of the constitutional right to remain silent?

Obviously, if the offenses were separately charged and tried, defendant would have the right to decide in each trial whether to testify or to rely upon his privileges against self-incrimination. I cannot agree that the rules relating to joinder of charges or proof of similar offenses were ever intended or should be applied to deprive a defendant of that constitutional right. Furthermore the majority ignores the fact that the trial court by sustaining an objection to cross-examination effectively ruled that there was no waiver of the privilege, but the majority treats the matter as if the trial court had made a contrary ruling.

Defendant was charged in the first count with a robbery at the Viking Club, in count 2 with a robbery at the Corner Market, and in counts 3 and 4 with robbing the bartender and a patron of Ralph's Bar. He took the stand and denied commission of the Viking Club and Corner Market robberies. He did not testify on direct examination with regard to the robberies charged in counts 3 and 4. When the prosecutor asked on cross-examination a question regarding the robberies charged in counts 3 and 4, the trial court sustained an objection on the ground

that the question was beyond the scope of the direct examination.

In his closing argument, the prosecutor commented on defendant's failure to explain or deny the evidence of his guilt as to counts 3 and 4. The trial court gave an instruction permitting the jury to draw an inference adverse to defendant from his failure to explain or deny facts within his knowledge.

Griffin v. California, 380 U.S. 609, which was decided after the verdict was returned in the instant case, held that such comment and instruction violates the Fifth Amendment privilege against self-incrimination. In concluding that the comment and instruction did not violate the rule of the *Griffin* case the majority reasons that by voluntarily taking the stand and testifying as to the offenses charged in counts 1 and 2 defendant waived his privilege not only as to those offenses but also as to the offenses charged in counts 3 and 4 because all of the robberies disclose a plan, pattern, or modus operandi similar in some respects. The majority finds itself in the anomalous position of affirming the judgment on all counts on the ground that the trial court erroneously limited the cross-examination of the defendant when it sustained the objection to questions relating to the offenses charged in counts 3 and 4.

I am of the opinion that the attempted cross-examination was clearly improper even if the common plan exception were applicable. If this is so, the waiver of defendant's privilege against self-incrimination did not extend to the offenses charged in counts 3 and 4. It is well settled that the breadth of the waiver by an accused who takes the stand in the trial "is determined by the scope of relevant cross-examination." (See Brown v. United States, 356 U.S. 148, 154-155; Johnson v. United States, 318 U.S. 189, 195.) This rule permits a defendant, before taking the stand, to determine the scope of his waiver and to intelligently weigh the alternatives of testifying or asserting his privilege, and, where the prosecution seeks improper cross-examination, it should not be held to come within the waiver. In the instant case, the defendant was thus effectively told by the trial court that the waiver did not extend to counts 3 and 4.

Moreover, in a number of situations this court has recognized that certain evidence, although relevant and admissible for a limited purpose, should be excluded where the prejudice to a defendant from the admission of the evidence will outweigh its probative value and where it cannot be reasonably expected that the jury will confine its consideration of the evidence to the limited purpose for which admission would otherwise be proper. (See, e.g., People v. Aranda, 63 Cal.2d 518, 530-531; People v. Henderson, 60 Cal.2d 482, 494-495; People v. Atchley, 53 Cal. 2d 160, 168; People v. Foote, 48 Cal.2d 20, 23-24.)

In Shepard v. United States, 290 U.S. 96, 104, where the defense introduced evidence that the decedent was contemplating suicide and the prosecution offered testimony that three weeks prior to her death the decedent had said that "Dr. Shepard has poisoned me," the court in holding that the quoted statement should not have been admitted to show state of mind of the decedent stated: "It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. . . . When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out." (See also People v. Talle, 111 Cal.App.2d 650, 670.)

These principles have been recognized by this court with regard to evidence of collateral offenses, and we have pointed out that evidence of such offenses carries with it the risk that its probative value may be outweighed by its possible prejudicial effect. (People v. Henderson, *supra*, 60 Cal.2d 482, 495.)

Although ordinarily the question whether possible prejudice warrants exclusion is addressed to the trial court (People v. Henderson, *supra*), permitting the cross-examination in the instant case would have been an abuse of discretion as a matter of law. Of necessity cross-examination of defendant as to the robberies charged in counts

3 and 4 bears directly on the issue of guilt of the robberies charged in counts 3 and 4, and it is obvious that a jury, whether or not given a limiting instruction, will consider such evidence as bearing on the issue of guilt as to those robberies and not merely as bearing on the offenses charged in counts 1 and 2 to which such cross-examination relates merely collaterally. In other words, the advantage, if any, that the prosecution may gain with respect to counts 1 and 2 in eliciting admissions by cross-examination of defendant as to the robberies charged in counts 3 and 4 is clearly outweighed by the risk of prejudice to defendant due to the possibility that the jury will consider such admissions in determining guilt of the charges in counts 3 and 4.

Moreover, even without regard to prejudice to defendant, the trial court's determination that the questioning of defendant as to the robberies charged in counts 3 and 4 was not proper cross-examination must be upheld because of the weakness of the showing that those robberies disclosed a plan, pattern, or modus operandi similar to the robberies charged in counts 1 and 2.

The majority summarizes such showing with regard to the four offenses charged and a prior offense as follows: "In the prior offense, as in each of the offenses charged, the place robbed was a business establishment in Sacramento, the robbery was committed during the evening or early morning hours, two or three men participated in the robbery, one or more of the robbers wore a mask, a gun was used in committing the robbery, and no victim was physically injured.. It further appears that in the prior robbery and all the robberies charged, except those at Ralph's Bar, property in addition to money was taken, that the Bankamericard taken in the Viking Club robbery was later used by defendant, and that the money orders taken at the prior robbery were likewise later used apparently by one of the robbers."

Counts 3 and 4, as pointed out above, relate to the robberies of Ralph's Bar, and those robberies occurred early in the morning, involved three robbers, and resulted in the theft of money only; whereas the other robberies occurred in the evening, involved two robbers, and resulted in the taking of property in addition to money.

I am satisfied that the ordinary principles of appellate review require us to uphold the trial court's determination that the questioning of defendant as to the offenses charged in counts 3 and 4 was not proper cross-examination. Since the questioning did not come within the scope of proper cross-examination, such questioning did not come within the waiver of the privilege, and it was improper for the prosecutor to comment on the fact that defendant did not deny commission of the offenses charged in counts 3 and 4, and it was error for the court to instruct the jury that it could draw an inference unfavorabl to the defendant from his failure to explain or deny facts within his knowledge.

People v. Ing, *ante*, page —, is distinguishable. In that case evidence of collateral crimes of which defendant was not charged was used to show a common scheme or plan. Since defendant was not charged with the collateral crimes, there was, of course, no danger that the jury would misuse the evidence to convict defendant of such crimes. For this reason I have signed the *Ing* opinion.

The misconduct and the erroneous instruction in the instant case require reversal if there is a reasonable possibility that the errors complained of contributed to the conviction. (Cal. Const., art. VI, § 13; Fahy v. Connecticut, 375 U.S. 85, 86-91; see People v. Bostick, 62 Cal.2d 820, 823-827.) The evidence to connect defendant with the robberies charged in counts 3 and 4 as set forth in the majority opinion is weak. Defendant did not testify with respect to those offenses, and I am of the view that there is a substantial likelihood that the misconduct and the erroneous instruction contributed to defendant's conviction of these offenses. A different situation appears, however, as to the offenses charged in counts 1 and 2. There was strong evidence to connect defendant with each of those robberies. Defendant denied commission of those robberies, and neither the misconduct nor the erroneous instruction was directed towards these offenses. Under the circumstances, there is no reasonable possibility that the matters complained of contributed to defendant's conviction of the offenses charged in counts 1 and 2.

I would reverse the judgments of conviction of the offenses charged in counts 3 and 4 and affirm the judgments of conviction of the offenses charged in counts 1 and 2.

PETERS, J.

* PEEK, J.

I CONCUR:

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 39

ENRIQUE PEREZ,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

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INDEX

SUBJECT INDEX

	Page
Cases Cited	i
Opinion Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Question Presented	5
Statement of the Case	5
ARGUMENT:	
The Petitioner Was Deprived of His Privilege Against Self-Incrimination When the Highest Court of California Allowed the Prosecutor to Comment and the Trial Judge to Give Instructions on the Petitioner's Failure to Explain or Deny Two Robberies Charged in a Four-Count Information After the Petitioner Took the Stand to Deny the Other Two Robberies Charged	10
1. The Comment and Instructions and Their Prejudicial Effect	10
2. The Comment and Instructions in Multi-Count Trials	19
3. The Scope of Cross-Examination in Multi-Count Trials	21
Conclusion	24

TABLE OF AUTHORITIES

CASES:

Caminetti v. *U.S.*, 242 U.S. 470, 61 L. Ed. 2d 442, 37 S. Ct. 192 ..... 21, 22, 23, 24

Griffin v. *State of California*, 380 U.S. 609, 14 L.Ed. 2d 102, 85 S. Ct. 1229 ..... 6, 10, 11, 15, 19, 20, 21, 24

Page

Johnson v. *United States*, 318 U.S. 189, 87 L. Ed. 704, 63 S. Ct. 549 ..... 22, 23, 24

Malloy v. *Hogan*, 378 U.S. 1, 845 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) 11

People v. *Bostic*, 44 Cal. Rptr. 649, 62 AC 869, 402 P.2d 529 (1965) 11, 12, 16

Peeople v. *Collier*, 44 Cal. Rptr. 465, 234 ACA 675 (4th Dist. 1965) 16

People v. *Keller*, 44 Cal. Rptr. 432, 234 ACA 460 (1st Dist. 1965) 15, 17, 18

People v. *Perez*, 65 Cal. 2d 615, 55 Cal. Rptr. 909, 422 P2d 597 ..... 6, 7

Tehan v. *U.S. ex rel. Shott*, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 20

STATUTE:

28 U.S. Code Sec. 1257(3) 2

CONSTITUTIONS:

United States Constitution
Fifth Amendment 2, 11, 19, 22, 23, 25
Fourteenth Amendment 2, 3, 11, 25

California Constitution
Article 6, Sec. 4½ 11

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of the State of California is reported in 65 Cal. 2d 615, 55 Cal. Rptr. 909, 422 P2d 597, and it appears in Appendix A, pages A-23 to A-35. The opinion of the Fifth Appellate District, State of California, is reported in 51 Cal. Rptr. 11, and which was vacated by the California Supreme Court, Appendix A, pages A-11 to A-22.

Jurisdiction

The judgment of the Supreme Court of the State of California was entered on January 27, 1967. It became final on February 27, 1967. A Petition for Writ of Certiorari to the Supreme Court of the State of California was duly filed in this Court. Said Petition was No. 65 Misc., October Term, 1966. This Court granted the Petition on March 4, 1968, transferred the case to the appellate docket and placed the case on the summary calendar. The case was assigned No. 1194, October Term, 1967. The petitioner had filed coincidentally with the Writ of Certiorari a Motion for Leave to Proceed in Forma Pauperis and this Court granted said motion. The jurisdiction of this Court is invoked under 28 U.S. Code Sec. 1257(3) and the Fifth and Fourteenth Amendments to the United States Constitution. The constitutional questions were raised originally at the Trial Court and assigned as error to the District Court of Appeal and to the Supreme Court of California.

Constitutional Provisions Involved

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States is as follows:

"Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use; without just compensation."

The Fourteenth Amendment to the Constitution of the United States is as follows:

"Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, including Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or in the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged,

except for participation in rebellion, or other crime, the basis of representation therein shall be reduced to the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Question Presented

Was the defendant deprived of his privilege against self-incrimination when the highest Court of California allowed the prosecutor to comment and the trial judge to give instructions on the defendant's failure to explain or deny two robberies charged in a four-count information after the defendant took the stand to deny the other two robberies charged?

Statement of the Case

On February 16, 1965, the District Attorney of the County of Sacramento filed an Information against appellant, ENRIQUE PEREZ, and defendant, DAVID PEREZ. The Information charged the petitioner with felonies, to wit: The crime of robbery in four counts. Count No. 1 with robbery from FRED FAUBLE of personal property belonging to the Viking Club on January 3, 1965; Count No. 2 with robbery from JAMES MONAHAN of personal property belonging to the Corner Market on January 15, 1965; Count No. 3 with robbery from RAY BINER of personal property belonging to Ralph's Bar on January 13, 1965; Count No. 4 with robbery from ELI DRAGASH of personal property belonging to ELI DRAGASH on January 13, 1965 (CT 8-9). The Information further charged the petitioner with two prior convictions of felonies as to each count of the Information, to wit: First, Robbery in the First Degree in judgment pronounced on March 5, 1962 in the County of Sacramento. Second, Robbery in the First Degree in judgment pronounced on March 5, 1962 in the County of Sacramento (CT 9-10).

Petitioner was tried by jury on April 13, 14, 15, 16 and 19, Judge William M. Gallagher presiding (CT 15, 16, 17, 18, 19, 20, 21, 22, 23). The jury returned a verdict of guilty as to each of the four counts.

The Court sentenced petitioner to State Prison for the term prescribed by law for the crime of Robbery of the First Degree (CT 26). Counts one and two to run consecutively and counts three and four concurrently (CT 25).

On May 10, 1965, the petitioner filed with the Clerk of the Superior Court of Sacramento County a Notice of Appeal from the final judgment and sentence (CT 27). On May 10, 1965, the petitioner filed a request for additional records (CT 29-30).

The judgment and sentence as stated in CT 25-26 and as stated above is correct and appears in the minute orders. The "term prescribed by law" as indicated in CT 26 is incorrect and does not reflect the minute order in the case.

The judgment was affirmed by the California Supreme Court in *People* v. *Perez,* 65 Cal. 2d 615, 55 Cal. Rptr. 909, 422 P2d 597 (A-23 to A-35).

At the trial the petitioner was charged and convicted of four counts of armed robbery. The petitioner took the stand in his own defense and testified as to only the first two robberies charged in the first two counts. He did not testify as to counts three and four which were separate incidents. The prosecutor in his closing argument to the jury, over the objections of petitioner's counsel, made reference to the fact that the petitioner had not testified or explained counts three and four. The Court gave the jury the same instruction which was used and disallowed in *Griffin* v. *State of California,* 380 U.S. 609 (RT 524) (Foot-

note 1, *People* v. *Perez*, 65 Cal. 2d 615). The facts as to each of the four counts charged in the Information are contained in the California Supreme Court's opinion and are as follows:

"Count 1 (January 3, 1965, robbery at the Viking Club):

"About 9 p.m. on January 3, 1965, two men entered the Viking Club in Sacramento. One of them was armed with a revolver and had a glove over his mouth. After informing the bartender, FREDERICK FAUBLE, that this was a holdup, the robbers took $325, a Bankamericard, and a Shell credit card. Defendant's fingerprints were found on a cigar box that was knocked off a shelf by one of the robbers.

"Defendant admitted using the stolen Bankamericard to make various purchases and signing Fauble's name to the sales slips. He testified that one Robert Gomes gave him the card in early January after trying to sell it to him. Defendant denied having been in the Viking Club on the night of the robbery and testified that he was with his brother, Miguel, and a friend, Joseph Rosales, when the robbery was committed. His alibi was supported by testimony of Miguel and Mrs. Joseph Rosales.

"Count 2 (January 15, 1965, robbery at the Corner Market):

"About 7 p.m. on January 15, 1965, David Perez (who is not a relative of defendant) and a second man entered the Corner Market in Sacramento. Each man carried a gun and held a glove or cloth over his face covering his nose and mouth. The men demanded money from Mr. and Mrs. James Monahan, who operated the store, and took from

them about $69 and a radio. Mr. and Mrs. Monahan identified defendart at the trial as the second robber. They had a momentary full face view of him on one occasion during the robbery when he dropped the covering from his face.

"Defendant testified that he was at home when the Monahans were robbed, and his alibi was supported by testimony of his brother Miguel and his mother.

"Counts 3 and 4 (Janudry 13, 1965, robberies at Ralph's Bar):

"About 1:15 a.m. on January 13, 1965, David Perez and two other men entered Ralph's Bar, which was in the same general neighborhood as the Corner Market. One of the men carried a revolver. David Perez wore a mask, and one of his companions used a handkerchief as a mask. Ray Biner, the bartender, and Eli Dragash, a patron who was partially blind, were in the bar. The robbers took $6 from Dragash and the money in the cash register. Biner and Dragash were unable to see the faces of the men who accompanied David Perez but described the height and weight of one of his companions, and the jury, of course, had an opportunity to observe the defendant.

"Defendant was with David Perez at the apartment of David's sister, Sylvia Moreno, about three blocks from Ralph's Bar at 1 or 1:30 a.m. on January 13, 1965, which was just before or after the robbery at that bar. The weapon used by defendant at the Corner Market robbery, clothing worn by him at that robbery, the stolen radio, and a coat worn by one of David Perez's companions at the Ralph's Bar robberies were found at Mrs. Moreno's apartment.

"Prior Collateral Robbery

"At 6:45 p.m. on November 10, 1964, two men entered the Modern Variety Store in Sacramento. Both wore stockings that covered their faces, and one carried a rifle. William George, the owner of the store, was working there that evening. The robbers took currency from the cash register, money orders and a check protector. Some of the stolen money orders were later negotiated.

"Items stolen in the Modern Variety Store robbery were left by defendant and one David Hunt at the home of an acquaintance. Defendant stated at that time that they got the items in a holdup in Sacramento.

"Defendant objected at the trial to the admission of the prior robbery, and the trial court, before admitting the evidence, held proceedings outside the jury's presence at which the Court was informed what evidence would be introduced and heard arguments on the matter."

David Perez, it should be noted, was not related to the petitioner (RT 353). The various comments by the prosecutor and the objections raised during the trial by defense counsel will be referred to throughout the argument that follows.

Judge Peters of the California Supreme Court in a Dissenting and Concurring Opinion summarizes the facts in a manner which spotlights the questions presented in this case:

"Defendant was charged in the first count with a robbery at the Viking Club, in count 2 with a robbery at the Corner Market and in counts 3 and 4 with robbing the bartender and a patron of Ralph's Bar. He took the stand

and denied commission of the Viking Club and Corner Market robberies. He did not testify on direct examination with regard to the robberies charged in counts 3 and 4. When the prosecutor asked on cross-examination a question regarding the robberies charged in counts 3 and 4, the trial court sustained an objection on the ground that the question was beyond the scope of the direct examination.

"In his closing argument, the prosecutor commented on defendant's failure to explain or deny the evidence of his guilt as to counts 3 and 4. The trial court gave an instruction permitting the jury to draw an inference adverse to defendant from his failure to explain or deny facts within his knowledge."

ARGUMENT

The Petitioner Was Deprived of His Privilege Against Self-Incrimination When the Highest Court of California Allowed the Prosecutor to Comment and the Trial Judge to Give Instructions on the Petitioner's Failure to Explain or Deny Two Robberies Charged in a Four-Count Information After the Petitioner Took the Stand to Deny the Other Two Robberies Charged.

1. The Comment and Instructions and Their Prejudicial Effect.

The petitioner in this case at bar took the stand to testify in his own defense regarding certain counts. Prior to the recent case of *Griffin* v. *State of California,* 14 L.Ed.2d 102, 85 S. Ct. 1229, 380 U.S. 609 (1965), prosecutors in state Courts could comment on the failure of the defendant to testify and the Courts invariably issued instructions to the

effect that the jury could draw unfavorable inferences from the defendant's failure to testify. *Griffin* v. *State of California, supra,* held that a comment by the prosecutor on the accused's silence or instructions of the Court that from such silence inferences of guilt could be drawn violated the Fifth Amendment of the U.S. Constitution and the privilege against self-incrimination. *Malloy* v. *Hogan,* 378 U.S. 1, 845 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), had previously decided that the privilege against self-incrimination applied against state action on the basis that it was protected by the due process clause of the Fourteenth Amendment of the United States Constitution. In the *Griffin* case, *supra,* the judgment was reversed but it was not clear if every comment or instruction would be per se tantamount to reversal. The California Constitution, Article 6, Sec. 4½ allowed such comment and instructions. *Griffin, supra,* did not make it clear if Article 6, Sec. 4½ in its entirety violated the U.S. Constitution. The California Supreme Court in *People* v. *Bostic,* 44 Cal. Rptr. 649, 62 AC 869, 402 P.2d 529 (1965) held that the comments and instruction and Article VI, Sec. 4½ per se were not unconstitutional and required a reversal, but reversal would be ordered only when a miscarriage of justice had occurred due to such comment or instruction. The Court said at page 651:

> "Such error, unless it resulted in a miscarriage of justice, does not, however, automatically require a reversal if Article VI, Section 4½ of our Constitution is applicable to it . . ."

In the *Bostic* case, *supra,* the California Supreme Court did not go into the factual questions of whether there was such a close question of guilt that the comments and instructions were the deciding factor because the Court de-

cided that the judgment had to be reversed on other grounds. The Court did not actually examine the facts to determine whether or not there was a miscarriage of justice, but it did lay down the ground rules and criterion. In *Bostic, supra,* the Court further said that either comment by the prosecutor or an improper instruction *each* constituted error. At page 650 the Court said:

> "It follows, therefore, that the comment of the prosecutor and the trial court's instruction herein *each* constituted error." (emphasis added)

In the case at bar, both errors occurred. First, the prosecutor commented several times on the failure of the appellant to testify as to all counts and the Judge instructed the jury on the inferences to be drawn from the failure to testify.

First, the prosecutor's comments on the failure to testify can be seen on page RT 457 where the defense counsel objected to the questioning. The comment is as follows beginning on line 13, page 457 and ending on line 1 of page 458:

> "'Why didn't Mr. Noland ask him that?' Well, the law restricts me on what I can ask him. If he doesn't mention it on cross-examination, I can't—I mean, on direct examination—
>
> Mr. Carroll: (Interposing) Your Honor, I would object.
>
> Mr. Noland: I can't get it on cross-examination.
>
> Mr. Carroll: I would object to this line of argument. I believe that is a comment that is far beyond—the State of California makes the exception in the recent case of Modesto.

The Court: You will restrict your comment, counsel, to within the law, and—however, he may make comment on the facts in evidence in this case, and on the evidence that was elicited, and that which was not elicited is not fair comment.

Mr. Carroll: I realize that, your Honor.

The Court: All right. Proceed."

The Court failed to strike the comment or admonish the jury to disregard it and failed to rule on the objection except to instruct the attorneys and tell them to proceed.

On page 461 line 1 to page 462 line 17 the prosecutor again makes reference after reference to the fact that the appellant failed to explain or to testify to certain facts. This argument by the prosecutor is as follows:

"They were together minutes after the Ralph's robbery at the place where all of these items, paraphernalia that were used in the robbery were found, and in spite of this the defendant doesn't say a word about it on the stand. He won't explain it to you. So Sylvia Moreno's testimony stands unexplained and uncontradicted, and as I have already told you, I cannot cross-examine because he chose to sit silent. The same as if he did not take the stand on that particular count. But the Court will instruct you that you may consider those things that you feel that he should have given an explanation to, you may consider that in weighing the evidence—the testimony as to whether it is more probable that he was telling the truth, or Sylvia Moreno is telling the truth about them being together, or the conclusions that you can deduct therefrom that are either favorable or unfavorable to him.

So let's do it again. Sylvia Moreno puts them together after the Ralph's Market (sic). Not just out in the street somewhere, but together where two days later the officers found all of this robbery equipment. Guns, hats, coats, and things, and the defendant doesn't chose to talk about it on the stand or give you any explanation.

Now, ladies and gentlemen, the defendant has admitted to you that—he only tells you what he wants you to know. He said that on the stand. He says, 'I don't talk about the forgeries. I didn't tell the police about the forgeries. I didn't want them to know about the forgeries.' There are objections to them coming into evidence here. Objection to the license number and that evidence, and all these things come in over strenuous objections, and I'm trying to fight all the way. Anyway, they are put before you in spite of these objections. Oh, he says, 'Yes, I admit those.' He selects what he wants to testify about on the stand, to give you only half of the story, or part of the story. He won't tell you all the story there. He has been convicted of an armed robbery before, which the Court will instruct you does haye bearing (sic). If you—in other words, you may consider that as to whether or not you believe anything he says, the fact that he has a prior conviction. So I say that you cannot believe what he has told you at all because of his selective testifying. His admitting to you that he tells you only what he wants you to know, and the fact that he has this prior conviction."

The second error committed concerns the instruction given by the Court. In RT page 524 line 16 to RT 525 line

11 the Court gives the very same instruction which was condemned in *Griffin, supra,* as error. The instructions given in this case are as follows:

> ". . . It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt."

Although the text of *Griffin* case, *supra,* does not quote the instruction given, a recent California case, *People* v. *Keller,* 44 Cal. Rptr. 432, 234 ACA 460 (1st Dist. 1965) does recite the *Griffin* instruction in footnote No. 1 at page 431. The instructions, therefore, in *Griffin, supra, Keller,*

supra, and the case at bar are identical. It was therefore error for the Court to give the instruction. From the record it is unclear who requested the instruction. A similar situation was recently presented in *People* v. *Collier*, 44 Cal. Rptr. 465, 234 ACA 675 (4th Dist. 1965). In that case the Court reversed the decision solely on the basis of the improper instruction. The Court held that it was unclear whether the instructions were requested by the defendants or prosecution but that the Court could not speculate on whether the error was invited. The Court in *Collier, supra*, further supports *Bostic, supra*, directly by saying on page 469:

> "The sweep of Griffin, as indicated by the language quoted is so broad as to apply, even though the District Attorney may not have commented on the defendant's failure to testify."

It is therefore clear that two distinct errors were committed in the case relating to the failure of the appellant to testify. In order for a reversal to be ordered this error must be prejudicial, according to the *Bostic* case, *supra*. This can be determined only by a review of all the evidence in the case to determine how close a question the appellant's guilt was as to each distinct count. It is appellant's contention that since the prosecution committed such confusion in the case that all counts became lumped together and it is impossible to tell what effect the comments of the prosecution and the Court's instruction played in the jury's deliberations.

The prosecution in the case at bar scattered confusion from the beginning. Several examples of this can be seen in the number of witnesses produced by the prosecution

on the point of the use of stolen credit cards in count one. Eight witnesses were used to prove what has to be regarded a minor link in the chain of evidence. Other things which happened in trial which undoubtedly caused confusion in the jury's minds was the unexplained relationship of Henry Perez, the appellant, and David Perez. Midway in the trial one juror commented in Court that she thought the Perezs were brothers and asked the Court if that was not true (RT 280-281). Further showing of the confused state of the evidence was the description of the robbers given by Mr. Dragish, the victim of count 4. Mr. Dragish admitted he was almost totally blind (RT 58) but gave the most vivid description in the trial, including a comment that his assailant was armed with "a .38 revolver with a six inch barrel" (RT 59). This case saw a prosecution witness identify the defense attorney as purchasing merchandise and using a stolen credit card (RT 96) and the jury saw the appellant's shoes removed and entered into evidence (RT 73). All of the aforesaid were permissible and any objection raised in appeal would normally be categorized as ludicrous since these objections don't normally go to the sufficiency of the evidence but to its weight. But the appellant submits that in the case at bar the totality of these events caused the various counts and issues before the jury to be blurred and rendered the jury's verdicts a miscarriage of justice.

In *People* v. *Keller, supra,* 44 Cal. Rptr. 432, 234 ACA 460, the Court did reverse the judgments after reviewing the evidence. In *Keller, supra,* the evidence produced by the prosecution was substantially greater than in the case at bar as to each and every distinct count. It is not necessary that an Appellate Court determine that a jury could

not convict the appellant without the comment and instruction errors but only that it is reasonably probable that a different verdict would have been reached. This is not the same type of review as is necessary to the Appellate Court in reversing a judgment for insufficiency of the evidence. In the latter, the appellant concedes that the Appellate Court would have to determine that not a sufficient amount of evidence was produced for any jury to find the defendant guilty beyond a reasonable doubt. This is the argument raised by item C herein by the appellant. However, the appellant asks for a reversal on the basis of the improper comment and instruction because it is reasonably probable that a different verdict would have been reached without the comment or instruction. In *Keller, supra,* p. 435, the Court said:

> "After reviewing the entire case, including the evidence, we are of the opinion that it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the error arising from the argument of the prosecution and the giving of the instruction on the subject of defendant's failure to testify. It is therefore necessary to reverse the judgment."

The question of guilt in the case at bar was so close according to the evidence produced at this trial compared to the *Keller* case, *supra,* that no other conclusion can be reached but that it is reasonably probable that a more favorable result would have been reached if either of the cited errors had not been made. Therefore, appellant respectfully submits that either one of the errors was prejudicial to the verdicts as to each count and to the judgment.

2. THE COMMENT AND INSTRUCTIONS IN MULTI-COUNT TRIALS.

Griffin v. *The State of California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, certainly expresses the reasons why the prosecution should not comment on the failure to testify and why the jury's attention should not be drawn to this fact by an instruction of the judge. The petitioner contends that the comment and instruction which violates the Fifth Amendment privilege against self-incrimination does just as much harm to the petitioner when used at separate trials or when used in multi-count trials. Each count means that he is subjected to detention. Petitioner submits that if the decision of the California Supreme Court were allowed to stand, the prosecutors could circumvent the rule of the *Griffin* case, *supra,* by charging as many separate incidents as possible and then commenting on the failure of the defendant to testify as to all of them. The petitioner did not waive his right to self-incrimination by testifying as to the first two counts because the reasons for the rule of *Griffin* remain. Each count is a crime punishable by a separate sentence. This is not the same as the case cited by the majority of the California Supreme Court where there is comment on the failure to explain a collateral uncharged crime. In that instance there is the defendant taking the stand to testify as to the crime charged. If he can't explain a collateral crime, the comment and instruction are all right because if he is convicted, he is convicted of the crime charged, *not* the thing he failed to explain. If he were tried at a later date on the collateral crime, the prosecutor could not comment on his failure to testify in the separate trial. In the case at bar the result is very much different. The

strong evidence of the first two counts tends to become merged with a weak case on the third and fourth counts, and he is convicted and punished for his failure to testify. If petitioner were charged in this information with practically any armed robbery in the area where similar clothing and gun were used, the comment and instruction allowed and the evidence of counts one and two brought to bear, a conviction would follow. This is the same danger that the *Griffin* case, *supra,* was trying to prevent. That is, that a person can be convicted of a crime by inferences drawn by his failure to testify. In the case at bar, the petitioner was convicted as to Counts Three and Four on the basis of his failure to testify. In effect, he incriminated himself.

The *Griffin* rule is applicable to the present case since this case was on direct appeal. *Tehan* v. *U.S. ex rel. Shott,* 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453.

The case at bar should be reversed since the determination of whether a person takes the stand in a multi-count indictment has been affected by this case. If this case were to stand the privilege against self-incrimination will be abrogated as to charged offenses which the defendant can't explain. The question is why have the privilege? Why can't the defendant explain? The privilege exists first because of the nature of our system. It is accusational, not inquisitional. The privilege exists, second, because even when the Constitution was drafted but possibly more so now a defendant cannot be expected to explain what he was doing on a certain day or why something happened. It should be up to the prosecutor to prove this and not up to the defendants to explain. This is just as important as to each charged crime which is separately punishable

in a multi-count indictment as it is to each separate trial. There is no absolute right to separate trial, but the prosecution should not benefit from inferences available at multi-count trial and not available at separate trials.

The petitioner submits that due to the fact that without the inferences drawn into the case by the comment and instruction, it is unclear that conviction could have been rendered. It should also be emphasized that since the comment and instruction were used that this tainted the convictions under counts one and two just as the comment and instructions tainted the conviction in the *Griffin* case, *supra*. If the case at bar is allowed to stand, the principles announced in *Griffin, supra,* and the privilege against self-incrimination will fall to an effective trial tactic of the prosecutor's in joining as many possible charged crimes together.

3. The Scope of Cross-Examination in Multi-Count Trials.

We reach finally the last area where the petitioner may fall and the prosecutor use what he said or did not say to convict himself. This area is the nature and scope of cross-examination in a multi-count trial. In the leading case, *Caminetti* v. *U.S.*, 242 U.S. 470, 61 L. Ed. 2d 442, 37 S. Ct. 192 the defendant was charged with four crimes. He took the stand and testified as to all crimes but stopped short on certain details. This Court held that when the defendant took the stand he waived his right to incriminate himself and a comment on his failure to explain certain details was permissible. In *Caminetti* this Court said at page 494:

> "Where the accused who takes the stand in his own behalf and voluntarily testifies for himself . . . he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events and already in evidence, in which he participated and concerning which he is fully informed without subjecting his silence to the inferences to be naturally drawn from it."

This Court again in *Johnson* v. *United States,* 318 U.S. 189, 195, 87 L. Ed. 704, 63 S. Ct. 549, held that under federal decision a defendant who takes the stand and testifies in his own behalf waives his Fifth Amendment privilege against self-incrimination at least to the extent of the relevant cross-examination. But the case at bar is distinguishable from the *Caminetti* case, *supra,* and *Johnson* case, *supra,* in that the cross-examination or the inquiry did not at that moment put the accused in jeopardy. In the case at bar if he were asked questions about the charged crimes his answers would be used to convict him. Each crime charged must be proven separately as to all elements. An inference cannot be used as proof of one of the elements of the corpus delicti, so why should an inference from a person's failure to testify be allowed to convict him? The requirements of fair trial may preclude any comment or cross-examination. That is the point in this case: A fair trial as to each crime precludes any comment and also precludes the cross-examination on a collaterally charged crime. A different reason exists for allowing cross-examination of a collateral crime which is relevant and which the defendant is not on trial for since he is not currently in jeopardy for that crime. He is not going to be punished for that crime now by testifying or failing to testify. The prosecution would have to prove an

entire case, establishing each element of the collateral crime and could use the cross-examination at the first trial to convict the defendant. However, the defendant would have the opportunity to rebut the prosecution case without the confusion which surrounds the multi-count trials. He would be able to elect to testify and if he did not do so, then no inference could be raised against him. Why should the functioning of the privilege against self-incrimination be placed in the hands of the prosecutor who by joining various counts could circumvent the privilege if the decision of the Supreme Court of California were allowed to stand. It is not a privilege of the prosecutor but of the defendant and should be only exercisable by the defendant.

Justice Peters in his dissenting opinion of the California Supreme Court Opinion (A-30 to A-35), clearly shows the reasons why questioning as to counts three and four on cross-examination was not relevant or if relevant, not proper in this case. But the rule which the petitioner requests that this Court now establish is even broader than this. In a case such as the one at bar, the defendant should not be considered to have waived his Fifth Amendment privilege against self-incrimination even as to relevant cross-examination when that cross-examination concerns crimes charged at that trial. The defendant should not be placed at the mercy of the prosecutor to explain or try to explain something he may not be able to and be punished by a separate conviction at that time for that testimony. As soon as the cross-examination concerns charged crimes which he has not testified to, there should be a constitutional barrier of the privilege against self-incrimination. In the *Caminetti* case, *supra*, and the *Johnson* case, *supra*, the defendant testified as to all the crimes charged. But here in the case at bar, the defendant chose

not to do so. He should not be convicted because the prosecutor and the instructions spotlighted this fact on counts three and four and was used by the jury to convict the petitioner.

CONCLUSION

The petitioner submits that in a multi-count trial this Court should hold that the Constitutional privilege against self-incrimination prevents cross-examination on crimes which are charged and on which the defendants did not testify. The petitioner believes that if the *Caminetti* case, *supra,* and the *Johnson* case, *supra,* had similar facts to the case at bar that the broad language contained therein would have been modified to this extent. It is our position that in this multi-count trial petitioner did not waive his privilege against self-incrimination as to all crimes charged nor to the extent of relevant cross-examination but only so far as the crimes which he testified to, relevant cross-examination on these crimes and collateral uncharged crimes.

The petitioner's conviction of all four counts charged should be reversed because of the errors in argument by the prosecution and instructions given. The status and organization of the trial evidence by the prosecution tended to confuse the jury as to all counts as can be seen in the verdicts of guilty in counts three and four which should as a matter of law be reversed for insufficiency of the evidence. The instructions and comments of the prosecutor were improper under *Griffin* v. *California, supra,* and the scope of cross-examination in multi-count trials should be limited because of the requirements of the privilege against self-incrimination.

In conclusion, upon the facts and law, it is respectfully urged that this Court grant this Petition for the reason that the petitioner herein has been deprived of his constitutional right not to act as a witness against himself, as protected by the Fifth Amendment and as supplemented by the Fourteenth Amendment to the Constitution of the United States of America.

Respectfully submitted,

PETER G. FETROS,
Attorney for Enrique Perez, Petitioner

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. [redacted] 39

ENRIQUE PEREZ,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT

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TOPICAL INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
The Defense To Count I	8
A. Alibi	8
Counts III and IV: Ralph's Bar and Eli Dragash	8
Count II: The Corner Market	11
Defense To Count II	13
A. Alibi	13
EVIDENCE OF A COLLATERAL CRIME NOT CHARGED IN THE INFORMATION	15
SUMMARY OF ARGUMENT	17
ARGUMENT	18
I. THE FIFTH AMENDMENT DOES NOT FORBID COMMENT BY COURT AND PROSECUTION WHERE A DEFENDANT ELECTS TO TESTIFY ON HIS OWN BEHALF BUT FAILS TO EXPLAIN RELEVANT EVIDENCE AGAINST HIM	18
(a) Waiver of the Privilege By Taking The Stand	18
(b) The California Waiver Rule	30
(c) Single Trial of Multiple Charges	33
II. ASSUMING A VIOLATION OF THE GRIFFIN RULE AS TO COUNTS III AND IV, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT	35
CONCLUSION	38

TABLE OF AUTHORITIES CITED

CASES

Page

Adamson, v. California (1947), 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 ---------- 21

Anderson v. Nelson (Apr. 1, 1968), --- U.S. ---, 36 U.S.L.W. 3381 ---------- 35

Bloch v. United States, 261 F2d 321 (5th Cir. 1919) ---------- 24

Branch v. United States, 171 F.2d 337 (D.C. D.C. 1948) ---------- 24

Brown v. United States (1958), 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 ---------- 24, 27

Chapman v. California (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 ---------- 35, 36

Caminetti v. United States (1917), 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 ---------- 22–24, 26, 30

Carpenter v. United States, 264 F.2d 565 (4th Cir.1959) ---------- 25

DeRose v. United States, 315 F.2d 482 (9th Cir.1963) ---------- 24

Fontaine v. California, --- U.S. --- 36 L. Week 3389 (4-8-68) 35

Griffin v. California (1965), 380 U.S. 609, 85 S.Ct. 1229 14 L.Ed.2d 106 ---------- 18, 19, 20, 29, 33, 35, 37

Harrison v. United States --- U.S. ---, No. 876, O.T. 1967 (6-10-68) ---------- 24

Johnson v. New Jersey (1966), 384 U.S. 719, 86 S.Ct. 1772 16 L.Ed.2d 882 ---------- 37

Johnson v. United States (1943), 318 U.S. 189, 63 S.Ct. 549 87 L.Ed. 704 ---------- 24, 25, 31

Levinson v. United States, 5 F.2d 567 (6th Cir.1925) ---------- 24

Malloy v. Hogan (1964), 378 U.S. 1, 84 S.Ct. 1489 12 L.Ed.2d 653 ---------- 19

Murphy v. Waterfront Commission (1964), 378 U.S. 52, 84 S.Ct. 1594 12 L.Ed.2d 678 ---------- 27

Ng Sing v. United States, 8 F.2d 919 (9th Cir.1926) ---------- 31

People v. Adamson, 27 Cal.2d 478, 165 P.2d 3 (1946) ---------- 21

People v. Arrighini (1898), 122 Cal. 121, 54 P. 591 ---------- 30

People v. Atchley (1959), 53 Cal.2d 160, 346 P.2d 764 ---------- 30

People v. Ing (1967), 65 Cal.2d 603, 422 P.2d 590 ---------- 30, 32

People v. Modesto (1965), 62 Cal.2d 436, 398 P.2d 753 ---------- 21

People v. O'Brien (1885), 66 Cal. 602, 6 P. 695 ---------- 30

People v. Perez (1967), 65 Cal.2d 615, 422 P.2d 597 ---1, 3, 33, 40

People v. Tarantino (1955), 45 Cal.2d 590, 290 P.2d 505 ---------- 31

People v. Withers (1946), 73 Cal.App.2d 58, 165 P.2d 945 ---------- 30

TABLE OF AUTHORITIES CITED—Continued

CASES—Continued

	Page
People v. Zerillo (1950), 36 Cal.2d 222, 223 P.2d 223	31
Powers v. United States (1912), 223 U.S. 303, 32 S.Ct. 281, 56 L.Ed. 448	24
Quinn v. United States (1955), 349 U.S. 155, 75 S.Ct. 668 99 L.Ed. 964	27
Ray v. United States 255 F.2d 473 (4th Cir.1958)	31
Redfield v. United States, 315 F.2d 76 (9th Cir.1963)	24
Sawyer v. United States (1906), 202 U.S. 150, 26 S.Ct. 575, 50 L.Ed. 972	24
Tehan v. Shott (1966), 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453	20, 37
Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956)	27
United States v. Bradley, 152 F.2d 425 (3rd Cir. 1945)	31
United States v. Sahadi, 292 F.2d 565 (2nd Cir. 1961)	24
United States v. Van Den Berg, 129 F.2d 654 (7th Cir. 1944)	24
United States v. Walker Co., 152 F.2d 612 (3rd Cir. 1945)	24
Ziegler v. United States, 174 F.2d 439 (9th Cir. 1949)	24

CODES

California Penal Code, § 995	30
§ 1323	30, 31

CONSTITUTIONS

California Constitution, art. 1, § 13	21
United States Constitution, Fifth Amendment	2, 18, 19

MISCELLANEOUS

McBaine, Cal. Evidence Manual (1960) pp. 79–80	30
8 Wigmore Evidence, § 2251, pp. 295–318	29
§ 2263, pp. 378–379	27
§ 2276, p. 462	29, 33
Witkin, Cal. Evidence (1958) pp. 510–511	30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 1194

ENRIQUE PEREZ, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the California Supreme Court is reported as *People* v. *Perez,* 65 Cal.2d 615 [422 P.2d 597] (1967). This opinion reversed the opinion of the Court of Appeal of the State of California, Fifth Appellate District, which is reported in 51 Cal.Rptr. 11.

JURISDICTION

Jurisdiction is conferred on this Court by Title 28 Sec. 1257(3) United States Code.

The judgment of the Supreme Court of the State of California was entered on January 27, 1967. A timely petition for a writ of certiorari was filed with this Court. A response was requested of respondent. After submission of the response, the petition for certiorari was granted on March 4, 1968. The case was assigned number 1194, October Term, 1967.

STATUTES INVOLVED

The pertinent statute and constitutional amendment are set forth in the Appendix hereto.

QUESTION PRESENTED

Does the Fifth Amendment forbid comment by court and prosecution where, as here, a defendant elects to testify on his own behalf but fails to explain relevant evidence against him?

STATEMENT OF THE CASE

On February 16, 1965, the District Attorney of Sacramento County filed in the Sacramento Superior Court an information charging petitioner Enrique Perez and one David Perez with four counts of armed robbery. Petitioner Enrique Perez was further charged with two prior felony convictions, both for first degree robbery (CT 7–10).

On February 25, 1965, the Public Defender was appointed to represent petitioner (CT 11).

On March 3, 1965, petitioner appeared for arraignment with defense counsel. He pleaded not guilty to

each of the four counts of robbery in the information. He also denied both prior convictions.

On March 11, 1965, Petitioner, through his counsel, moved under Penal Code section 995, in the Sacramento Superior Court to set aside Counts III and IV of the information. The Court denied the motion (CT 13). Petitioner was arraigned on two prior convictions, both of which he admitted (*Ibid.*).

On April 13, 14, 15, 16 and 19, 1965, petitioner, represented by counsel, was tried before a jury in the Sacramento County Superior Court (CT 15–18, 23).

On April 19, 1965, the jury returned verdicts of guilty against Enrique Perez on each of the four counts charged in the information (CT 19–23).

On May 19, 1965, the court denied probation to petitioner who was present with counsel, as well as his motion for a new trial (CT 26), and entered judgment of conviction (CT 24). The court sentenced petitioner to the California State Prison for the term prescribed by law, the sentences to run consecutively as to Counts I and II, concurrently as to Counts III and IV (CT 25). The judgment was reversed by the Court of Appeal of the State of California, Fifth Appellate District. That court's opinion was vacated and the judgment affirmed by the California Supreme Court in *People* v. *Perez,* 65 Cal.2d 615 [55 Cal.Rptr. 909, 422 P.2d 597] (1967).

The facts are as follows:

Count I: The Viking Club Robbery

Count I concerns the robbery by two men (RT 24) of the Viking Club, 1445 33rd Street, Sacramento (RT 23).

Frederick Harold Fauble was working at the Viking Club when the robbery occurred about 9:00 p.m. on the night of January 3, 1965 (RT 23).

The two robbers were approximately the same size (RT 24): about 5'6" or shorter with light builds (RT 30).

One of the robbers was dark complexioned (RT 24) with dark, slightly wavy hair (RT 25, 30, 32). This dark complexioned, dark haired robber wore a dark colored windbreaker jacket (RT 25, 40), and was armed (RT 24) with a small caliber automatic pistol (People's Exhibit 3, RT 26, 35). He wore a glove on one hand (RT 35), and held a wrist length black leather glove over his mouth (RT 24).

The other robber was blond haired (RT 24, 25), and light complexioned (RT 30). Fauble could not recall whether the blond haired robber was armed (RT 26).

The dark complexioned robber held a gun on Fauble and ordered him to "Come out from behind the bar, lay down on the floor" (RT 27). Fauble could hear the two robbers "go behind the counter and get into the cash register" (RT 28). Then the robbers tied up Fauble and "proceeded to go through the bar" (RT 28).

The robbers again returned to Fauble, this time blindfolding him and moving him to the storage room

in the back part of the bar where he was again told to lie down (RT 28, 29–30). Fauble could hear the robbers nearby "taking things off the shelf" (RT 28). Some of the shelved things the robbers were rustling through "were falling all around me as I was laying there" (RT 28).

Fauble heard some "cigar boxes knocked off the shelf" by the robbers (RT 28). One of these was a Roi Tan cigar box (People's Exhibit 22) from which three fingerprints were lifted (People's Exhibits 23 A and B) (RT 115–116). Two of the fingerprints were identifiable: one was the right thumb of petitioner, the other was from petitioner's right middle finger (RT 122, 123).

The loot taken from the Viking Club and Frederick H. Fauble, through use of force and fear (RT 29), consisted of approximately $325 in cash, a Shell credit card, and a BankAmericard (RT 26). Fauble's BankAmericard bore serial number 130625825 (RT 26).

After he heard the robbers leave, Fauble got himself loose in about 10 or 15 seconds (RT 28, 35–36) and saw what he believed to be a Ford station wagon drive by on the street in front of the victimized Viking Club (RT 31, 36, 37). The driver of the station wagon resembled the dark complexioned robber (RT 36, 38, 39).

Petitioner by his testimony admitted that he had made about 10 purchases on the stolen BankAmericard over a week's time (RT 412, 415, 417). Petitioner admitted that when he used the stolen BankAmeri-

card that he signed the name of "Fred Fauble" (RT 412, 415) to the sales drafts.

Among the purchases made on the stolen BankAmericard beginning the day after the robbery were the following:

1. On January 4, 1965, Frederick Fauble's stolen BankAmericard was used at Stan's Men's Store in Woodland, California. The salesman distinctly remembered petitioner making the purchase and using the BankAmericard (RT 42). Although he was not certain, the salesman thought petitioner had purchased a Pendleton shirt and some socks (RT 42, 61–62).

2. On January 4, 1965, Frederick Fauble's stolen BankAmericard was used to purchase a $24.95 watch from the Ben Franklin Store, Davis, California (RT 95). Petitioner "looks like one of the two" men who made this purchase (RT 98).

3. On January 4, 1965, Frederick H. Fauble's stolen BankAmericard was used at IXL, Inc., 804 "J" Street, Sacramento (RT 139), to purchase a pair of black imitation leather gloves similar to People's Exhibit 10 (RT 141, 144). Salesman, Jim Bell, recalled having seen petitioner in the IXL store (RT 142). Petitioner admitted that he has a pair of black gloves like People's Exhibit 10 (RT 442). These gloves were worn by petitioner in the Corner Market holdup (Count 2) (RT 149, 150).

4. On January 4, 5, or 6, 1965 (RT 76–77) Fauble's stolen BankAmericard was used at Devlin's Shoe Den, 1007 11th Street, Sacramento (RT 71), to purchase

the pair of shoes which petitioner was wearing in court at the time of the trial (RT 74). Petitioner admitted having made this purchase on the stolen BankAmericard (RT 412).

5. On January 5 and 7, 1965, the stolen BankAmericard was used to make purchases at two different Shell service stations (RT 102, 106–107, 134), in the Sacramento area for a vehicle bearing license number LDT 141 (RT 102, 127). A 1950 Willys station wagon with license number LDT 141 was registered to petitioner. Petitioner admitted buying gasoline for his Willys station wagon, license number LDT 141, by use of Frederick Fauble's stolen BankAmericard (RT 413, 445).

6. On January 7, 1965, a black, narrow-brimmed hat (People's Exhibit 8; RT 15) was bought from Jim Patterson's Men's Store, 9th and "K", Sacramento (RT 89, 91, 92), by use of Frederick Fauble's stolen BankAmericard. While witness Jim H. Patterson did not recall the particular hat sale (RT 92, 94), the hat was identified as merchandise from Jim Patterson's Men's Store from the label and price tag which were still in the hat at the time of the trial (RT 91–92). Patterson also recognized his handwriting on the sale's slip (RT 90, 93). Petitioner admitted he (RT 413) used the stolen BankAmericard to purchase the hat at the Jim Patterson Store. People's Exhibit 8 was the type of dark, narrow-brimmed hat which petitioner wore when he robbed the Corner Market (Count II) (RT 150, 187).

THE DEFENSE TO COUNT I

A. Alibi

Petitioner took the stand in his own defense (RT 411). He denied having been to the Viking Club on the night of the robbery, January 3, 1965 (RT 424). Petitioner said he had been with his brother Miguel and a friend Joseph Rosales between 7:30 p.m., January 3, and 1:00 a.m. on January 4. Petitioner's testimony was supported by testimony of Mrs. Joseph Rosales (RT 323–325) and petitioner's brother Miguel Perez (RT 335, 337).

Petitioner testified that he had been given Frederick H. Fauble's BankAmericard "in early January" from one Robert Gomes who had originally tried to sell the card to Perez (RT 416, 417, 445).

COUNTS III AND IV: RALPH'S BAR AND ELI DRAGASH

On the night of January 13, 1965, at 1:15 a.m., three men held up Ralph's Bar, 1730 16th Street, Sacramento. The robbers took, by force and fear (RT 49) "everything out of the cash register, all the coins and cash" (RT 47) from Ralph's Bar and $6.00 from Eli Dragash, a customer in the victimized bar (RT 58).

The robbers were one large man with a "large football type of physique" and two smaller men (RT 46).

The larger robber with the football player physique was one David Perez (RT 47–48) who pleaded guilty

to both the robberies of "Ralph's Market [sic] and the Corner Market [Count II]" (RT 204).

David was wearing a white Halloween mask over the lower part of his face (RT 49, 52–53). He ordered bartender, Biner, to come out from behind the bar (RT 53). Biner and the two customers were taken to the north end of the room where they were made to lie on the floor (RT 51). David went behind the bar and moved some cigar boxes from near the cash register in the process of getting at the money (RT 54, 55).

Neither bartender Biner, nor customer-robbery victim, Eli Dragash was in a position to get a look at the faces of the two shorter robbers (RT 46–47, 57–58).

One of the smaller robbers wore a tan three-quarter length trench coat (People's Exhibit 5; RT 46, 47, 50, 58, 59). This robber was about 5'7" in height (RT 50–51), and wore besides his rain coat, a hat and a handkerchief mask (RT 58–59). He carried "a .38 caliber revolver with a six-inch barrel" (RT 59).

Petitioner was seen with confessed robber David Perez and one Joe Jordan about 1:00 or 1:30 a.m. on January 13, 1965 (RT 204) at Sylvia Moreno's apartment, 2117 15th Street, Sacramento. This was either just before or just after the Ralph's Bar holdup and only about three blocks from the scene of the crime (RT 203). The three men, who "didn't stay too long", left Sylvia Moreno's apartment together (RT 205).

Two days after the Ralph's Bar holdup and following the Corner Market holdup (Count II) the Sacramento police took from Sylvia Moreno's apartment the weapons and disguises used and some of the loot taken in the robberies for which petitioner was on trial (RT 9–21). This evidence collected from Sylvia Moreno's apartment included:

The .32 caliber revolver with a hexagonal barrel (People's Exhibit 2; RT 11) used by petitioner in the Corner Market holdup (RT 151, 152, 198).

The Beretta .22 automatic pistol (People's Exhibit 3; RT 12) used in the Viking Club robbery (RT 26, 35) and by David at the Corner Market robbery (RT 152).

A tan or off-white raincoat (People's Exhibit 5; RT 13–14) used in the Ralph's Bar robbery (RT 47), and the Modern Variety Store holdup (RT 246, 256).

A black raincoat (People's Exhibit 6; RT 14) worn by petitioner in the Corner Market (RT 149–150, 187), and Modern Variety Store (RT 246, 256) robberies, and acknowledged as belonging to petitioner (RT 373, 375, 389, 437, 438).

A black narrow-brimmed hat (People's Exhibit 8; RT 15), purchased by petitioner on Fred Fauble's stolen BankAmericard at Jim Patterson's Men's Store (RT 89, 91, 92) and worn by petitioner in the Corner Market holdup (RT 149–150, 187).

The right glove of a pair of black imitation leather gloves (RT 16, 21).[1]

[1] The left glove of this pair was found in the automobile in which petitioner was riding with David Perez and Joe Jordan at the time of their arrest (RT 16, 21).

A radio (People's Exhibit 1; RT 10) which petitioner himself robbed from the Corner Market (RT 156, 182–183, 186).

COUNT II: THE CORNER MARKET

Two nights after the robbery of Ralph's Bar, petitioner and David held up the Corner Market, 1700 "V" Street, Sacramento. This robbery occurred at about 7:00 p.m. on the evening of January 15, 1965 (RT 148, 185). The victim-witnesses were James Monahan, store owner, and his wife.

David was the heavy set robber (RT 149), armed with an automatic pistol (People's Exhibit 3; RT 152) who confessed to this robbery (RT 204) and the holdup of Ralph's Bar.

Petitioner, the smaller robber with a lighter build (RT 149) carried a revolver with an "odd looking", "hexagonal" barrel (People's Exhibit 2; RT 151, 152, 198).

Both robbers wore dark coats (People's Exhibit 6) and black gloves, probably leather (People's Exhibits 9A, 9B and 10) (RT 149, 150, 187). Both robbers wore dark narrow-brimmed hats of the same type (People's Exhibit 8) (RT 150, 187). They wore dark pants, similar to People's Exhibit 7 (RT 150–151, 187).

Each robber held what appeared to be a glove or cloth (RT 170, 171–172, 174) or handkerchief (RT 178) up to his face so that his nose and mouth were

covered (RT 170, 178, 193). Petitioner had his hat pulled down to his eyebrows (RT 179).

Petitioner went right to the counter with gun in hand and said, "This is a stick-up" (RT 163–164). He made Mrs. Monahan put all the cash register money in a paper bag. Mr. Monahan was made to hand over his wallet which contained 14 to 17 dollars (RT 165, 186). The Monahans testified, "He told us to drop our hands and not make a move, or not to look at him or he would kill us" (RT 167, 179, 190).

Just before petitioner walked behind the counter to search for more loot, he momentarily dropped the glove or cloth held in front of his face (RT 189). Mrs. Monahan was right across the counter from petitioner and got a clear view of his face (RT 189). When petitioner walked behind the counter and reached for a radio that the Monahans kept there, he again dropped the covering from his face (RT 179). At this time Mr. Monahan got a momentary look at petitioner's face (RT 179–180).

Petitioner took Mrs. Monahan's radio from the counter beneath the cash register (RT 156, 182–183, 186), and left the victimized store with his partner, David (RT 167, 182–183, 186). Besides the radio (People's Exhibit 1) (RT 156, 186), the robbers took, by force and fear, $69.00 in cash from The Corner Market (RT 156, 185).

Each of the Monahans, in open court, identified petitioner as the shorter of the two robbers who held them up, and as the only robber of whom they got a

full face view (RT 154, 169, 186–187). Mrs. Monahan testified that when petitioner robbed The Corner Market he was dressed in dark clothes including a black narrow-brimmed hat (People's Exhibit 8), a pair of black gloves similar to People's Exhibit 10, and a coat (People's Exhibit 6) (RT 187).

Each of the Monahans separately (RT 199) identified petitioner out of a police line-up (RT 155, 191). At the time of the police line-up there was some doubt in Mrs. Monahan's mind as to whether petitioner was one of the robbers of The Corner Market (RT 195, 196). Mrs. Monahan asked to see the suspect with a hat on because that was the way she had viewed the robber (RT 192). After Mrs. Monahan saw petitioner with a hat on she had no doubt as to the identity of petitioner as one of the robbers (RT 200, 201). At the time of her testimony, Mrs. Monahan had no doubt that petitioner was one of the robbers (RT 200).

DEFENSE TO COUNT II

A. Alibi

Petitioner sought to establish the alibi that he was at his home from about 6:00 p.m. until about 8:30 p.m. on the night of Friday, January 15, 1965, when The Corner Market was robbed at 7:00 p.m.

Petitioner took the witness stand in his own behalf and testified that he arrived home about 6:00 p.m. on January 15th, and that he was there until he left with David Perez and Joe Jordan between 8:30 and 9:00

p.m. (RT 426, 427). Petitioner testified that David and Joe had come to petitioner's home about 7:45 p.m., had entered the house, and stayed about a half hour before the three men left together shortly before they were arrested (RT 426, 427).

Petitioner was impeached by a prior felony conviction when he testified that in 1962 he pleaded guilty to an armed robbery and was sent to the Youth Authority (RT 452, 453).

In support of petitioner's alibi, two witnesses, petitioner's brother and mother, told somewhat inconsistent stories.

Miguel, petitioner's brother, testified that petitioner was home for dinner on January 15, around 6:00 or 6:30 p.m. About 6:45 p.m., Miguel left the Perez home for about one half hour to go to the store (RT 339, 340). Petitioner Enrique Perez was said to have been home both when Miguel left and returned from his errand (RT 341). David Perez and Joe Jordan were not at Enrique Perez's home when Miguel left at 6:45 p.m. (RT 340). Miguel did not recall when David and Joe arrived at the Enrique Perez home (RT 342). They arrived "somewhere between 7:30 and 8:00" (RT 339) because they were at the Perez (RT 341–342) residence when Miguel returned "close to 7:00, 6:45, quarter to seven" (RT 340) or "Seven-thirty. I don't know. About 7:00, 7:30, somewhere like that" (RT 342). When Miguel returned home "he [petitioner] was getting dressed

along with Jordan and David Perez . . . . They were just talking while he was getting dressed, ..." (RT 342).

Petitioner's mother, Mrs. Librada Perez testified that her son, Enrique Perez, arrived home about 5:00 or 5:30 p.m. (RT 362) and was at home the entire period from his arrival "until he left the house just before he was arrested" (RT 363). Mrs. Perez was home the entire time from 5:00 o'clock until Henry left the house (RT 363). Mrs. Perez testified that none of Enrique's friends came inside the house on the night of the arrest (RT 363, 366). According to Mrs. Perez, petitioner left the house to meet some friends who came by to pick him up and were waiting outside (RT 363). Mrs. Perez was watching television in the living room (RT 366), and saw her son, petitioner Enrique Perez, "going out the front door that night" (RT 367).

EVIDENCE OF A COLLATERAL CRIME NOT CHARGED IN THE INFORMATION

Evidence was admitted (RT 245) of a robbery of the Modern Variety Store, 23rd and "F" Streets, Sacramento at 6:45 or 6:50 p.m., on the night of November 10, 1965. In the instant case, petitioner is not charged with this crime. Evidence of the Modern Variety Store robbery was admitted for the limited purpose of establishing the identity of petitioner as a perpetrator of the counts charged through evidence of a similar modus operandi (RT 243, 244, 245, 530–531).

William E. George, owner and operator of the Modern Variety Store was the victim (RT 245-257).

Both robbers were white men (RT 247). Both wore stocking masks which covered their faces and heads (RT 247, 255). Neither man was recognizable (RT 255). The taller robber was about 5'9", the shorter robber was about 5'6" or 5'7" in height (RT 246, 254). Both robbers wore trench coats. The taller robber's coat was tan or beige (People's Exhibit 5). The shorter robber wore a black trench coat (People's Exhibit 6) (RT 246, 256).

The taller robber was armed with a sawed-off .22 rifle (RT 257) (People's Exhibit 26) (RT 250, 257). Mr. George saw no weapon on the shorter robber (RT 257.)

The taller robber entered the store first with his shorter partner directly behind him. The tall man went to the front of the counter and motioned Mr. George to stand back. The shorter robber went behind the counter where Mr. George was standing (RT 250, 257). At the tall robber's order, Mr. George opened the cash register. The short robber took the currency from the cash register and probably also took a few silver dollars. After looking under the money tray and finding nothing, the short robber tried to pull up the stationary dividers in the cash register. Mr. George told him they were not removable (RT 251).

Then the tall robber asked his victim, "where's the money orders?" Mr. George pointed down to them.

The short robber picked up the blank money orders after initially having grabbed some utility bill stubs. The taller robber picked up the check protector, and the two robbers departed from the victimized store (RT 252).

The loot from the Modern Variety Store robbery consisted of a check protector People's Exhibit 27; RT 249, 250), a block of blank money orders (People's Exhibit 28; RT 249, 250) and cash (RT 251). The check protector was needed to make the blank money orders negotiable (RT 252).

Petitioner and a man named Hunt went to the home of Richard Bostic in San Francisco and left the .22 rifle used in the Modern Variety Store robbery (People's Exhibit 26) along with the stolen check protector and money orders (People's Exhibits 27 and 28) (RT 259, 260).

At the time the weapon and loot of the Modern Variety Store robbery were left with Bostic, petitioner confessed to Bostic that the items had been acquired in a holdup in Sacramento that very day (RT 261–262, 264–265). The San Francisco police took the rifle, check protector, and money orders from Bostic about one day after petitioner and Hunt had delivered them (RT 265, 266).

SUMMARY OF ARGUMENT

Where a defendant elects to testify in his own behalf but fails to explain relevant evidence against him neither the Fifth Amendment nor the rule in

Griffin v. *California* prohibits comment on his failure to deny or explain the evidence against him.

Petitioner, by testifying in his own behalf, waived his constitutional privilege against self-incrimination to the extent of the permissible scope of cross-examination. Since the offenses charged in Counts III and IV, as well as the collateral offense, were relevant to show a common scheme or plan, cross-examination as to these offenses was proper. Moreover, the joinder of the four counts of robbery for trial was proper and did not prejudice petitioner.

Even if it be assumed there was a violation of the *Griffin* rule as to Counts III and IV, nevertheless the error was harmless beyond a reasonable doubt.

ARGUMENT

I. The Fifth Amendment Does Not Forbid Comment by Court and Prosecution Where a Defendant Elects to Testify on His Own Behalf But Fails to Explain Relevant Evidence Against Him

(A) WAIVER OF THE PRIVILEGE BY TAKING THE STAND

Petitioner took the stand in his own behalf and gave alibi testimony with respect to the robberies charged in Counts I and II. He did not testify on direct examination to the robberies charged in Count III and IV or to the collateral robberies. On cross-examination the prosecution asked a question relating to the robberies charged in Counts III and IV. An objection was sustained on the ground that the question was beyond the scope of direct examination.[2] In argument

[2] The California Supreme Court held that this restriction on cross-examination was improper.

to the jury the prosecution commented on petitioner's failure to explain or deny the evidence against him as to Counts III an IV. The trial court gave instruction permitting the jury to draw an inference adverse to defendant from his failure to explain or deny facts within his knowledge.[3]

It is respondent's position that it was not a violation of the Fifth Amendment privilege against self-incrimination for the prosecutor to argue and the court to instruct the jury that an inference unfavorable to the petitioner could be drawn from his failure to explain or deny facts within his knowledge relating to Counts III and IV and to the collateral offense established by the evidence.

In *Malloy* v. *Hogan,* 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964), this Court applied the Fifth Amendment's injunction that no person "shall be compelled in any criminal case to be a witness against himself" to the states through the provisions of the Fourteenth Amendment. It further held that the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.

Subsequently, in *Griffin* v. *California,* 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965), the Court specifically held that California's comment provision was a violation of the privilege against self-incrimination *in the case of a defendant who did not choose to take the stand and testify.* This Court reasoned that com-

[3] See Appendix A, attached.

ment on the refusal to testify was a penalty imposed for exercising a constitutional privilege inasmuch as it cut down on the privilege by making its assertion costly. The Court then forbade either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt in such a situation.

In *Tehan* v. *Shott*, 382 U.S. 406, 15 L.Ed.2d 453, 86 S.Ct. 459 (1966), this Court limited the applicability of the *Griffin* decision to those cases in which the judgment had not yet become final (i.e., the availability of appeal exhausted and the time for petition for certiorari elapsed or petition for certiorari denied) [4] prior to April 28, 1965. In limiting the retroactivity the Court evaluated the reasons for holding impermissible comment by a judge or prosecutor upon a defendant's failure to testify, among which were (1) preservation of the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder the entire load"; (2) that all states had by their own laws respected the basic purposes of the Fifth Amendment but in varying forms; (3) the Constitution's basic concern was for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life.

In *Griffin*, the defendant did not take the stand. In the instant case, the petitioner did take the stand. It

[4] Petitioner's direct appeal was pending on the date Griffin was decided and Griffin is therefore applicable.

was not for a limited purpose such as challenging the validity of the foundation for the introduction of a confession or refuting the legality of obtaining evidence but to present an affirmative defense as to certain portions of the charge against him. By so doing, it is submitted he has relinquished his "right to a private enclave where he may lead a private life."

As applied to this situation, California's comment rule (art. 1, § 13, California Constitution) should validly apply. Article 1, Section 13 provides in part:

> ". . . in any criminal case, *whether the defendant testified or not,* his failure to explain or to deny his testimony any evidence or facts against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. . . ." (Emphasis added) [5]

The right of comment is limited and the limitations were explained to the jury in the instructions given (*People* v. *Adamson,* 27 Cal.2d 478 [165 P.2d 3] (1946); *Adamson* v. *California,* 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947); *People* v. *Modesto,* 62 Cal. 2d 436 [398 P.2d 753] 1965; Appendix A). Although this Court has struck down the provision of the California Constitution with relation to the comment and instruction as to a nontestifying-defendant, nowhere in its opinions has the Court intimated that it intended to pass upon the validity of that portion of the constitutional provision in question which permits comment by the prosecution once the defendant chooses

[5] See Appendix C.

to take the stand but fails to explain the evidence against him.

Both the state and federal cases have recognized that the privilege against self-incrimination is one that may be waived. The landmark case on the subject of the waiver of the privilege by electing to testify is *Caminetti* v. *United States,* 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917). It was there held that an accused who takes the stand and voluntarily testifies in his own defense may not stop short in his testimony by failing to explain incriminating circumstances already in evidence in which he participated and concerning which he is fully informed without subjecting his silence to the inferences naturally to be drawn from it and justifying comment by the court in its instruction that the jury may take such omission into consideration in reaching a verdict. The reasoning of the court in *Caminetti* and the scope of the waiver were stated in the following language:

> "We think the better reasoning supports the view sustained in the court of appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself (Act of March 16, 1878, 20 Stat. at L. 30, chap. 37, Comp. Stat. 1913, § 1465), he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

"The accused, of all persons, had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him. The instruction to the jury concerning the failure of the accused to explain acts of an incriminating nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence, must be read in connection with the statement made in this part of the charge which clearly shows that the court was speaking with reference to the defendant's silence as to the trip to Reno with the girls named in the indictment, and as to the facts, circumstances, and intent with which that trip was taken; and the jury was told that it had a right to take into consideration that omission.

"The court did not put upon the defendant the burden of explaining every inculpatory fact shown or claimed to be established by the prosecution. The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his

> own behalf. We agree with the circuit court of appeals that it was the privilege of the trial court to call the attention of the jury in such manner as it did to this omission of the accused when he took the stand in his own behalf." (61 L.Ed. at pp. 456–457.)

Since the *Caminetti* decision the federal courts have closely followed the principles established in that case. See *Redfield* v. *United States,* 315 F.2d 76 (9th Cir. 1963); *United States* v. *Sahadi,* 292 F.2d 565, 586 (2d Cir. 1961); *United States* v. *Walker,* 152 F.2d 612 (3rd Cir. 1945); *United States* v. *Van Den Berg,* 139 F.2d 654, 656 (7th Cir. 1934); *Levinson* v. *United States,* 5 F.2d 567, 569 (6th Cir. 1925); *Bloch* v. *United States,* 261 F. 321 (5th Cir. 1919). The general trend of the federal cases is that the waiver by an accused who takes the stand in his own behalf "is determined by the scope of relevant cross-examination" (*Harrison* v. *United States,* ___ U.S. ___, No. 876 O.T. 1967 (June 10, 1968); *Brown* v. *United States,* 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958); *Johnson* v. *United States,* 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704 (1943); *Powers* v. *United States,* 223 U.S. 303, 32 S.Ct. 281, 56 L.Ed. 448 (1912); *Sawyer* v. *United States,* 202 U.S. 150, 26 S.Ct. 575, 50 L.Ed. 972 (1906); *Ziegler* v. *United States,* 174 F.2d 439 (9th Cir. 1949); *Branch* v. *United States,* 171 F.2d 337 (D.C. D.C. 1948); *DeRose* v. *United States,* 315 F.2d 482 (9th Cir. 1963)).

The waiver is not limited by the fact that the defendant's answer on cross-examination might tend to establish his guilt of a collateral offense for which he could still be prosecuted (*Johnson* v. *United States,* 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704 (1943); *Carpenter* v. *United States,* 264 F.2d 565 (4th Cir. 1959)). In the *Carpenter* case the defendant was convicted on all counts of indictments charging him with the interstate transportation of three kidnapped persons and two stolen automobiles.

The charges against defendant arose out of a series of events which started with a shooting in a bar. After the shooting the defendant and his accomplice attempted to escape. During the attempted escape the people were kidnapped and the cars stolen.

The defendant took the stand and testified about all relevant events except what had occurred in the bar. On cross the prosecutor attempted to ask him about the shooting in the bar. The defense objected on the ground that this inquiry was beyond the scope of the direct. The court ruled that this was proper cross and the defendant then refused to answer the questions on the ground that he had been indicted elsewhere for the bar shooting and his answers to the prosecutor's questions would incriminate him. The court ordered him to answer, and when he refused, cited him for contempt. The court instructed the jury that it could consider the fact that defendant refused to answer these questions as evidence against him.

The court held that "it matters not that the defendant's claim is that his anwers to the line of inquiry would tend to establish his guilt of homicide for the commission of which he was then under indictment, but not on trial. So long as the inquiry was relevant to the issue in the case then being tried and the answers were within his knowledge, the inquiry was within the compass of the waiver of his privilege when he voluntarily became a witness, and his refusal to answer became a proper subject of comment and consideration."

A consideration of the history and the policy of the Fifth Amendment privilege leads to the conclusion that the principles concerning the waiver of it announced in the *Caminetti* case and others cited herein do not impair the exercise of this privilege. It should first be noted that the phrasing of the constitutional privilege is that no person "shall be compelled in any criminal case to be a witness against himself." Logically, this phraseology does not encompass a sitution where a person accused of crime voluntarily takes the stand. Wigmore points out that:

> "The *history* of the privilege (§2250 *supra*)—especially the spirit of the struggle by which its establishment came about—suggests that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to *extract from the person's own lips* an admission of guilt, which would thus take the place of other evidence. That is, it was intended to prevent the use of legal compulsion to extract from the person

> a sworn communication of his knowledge of facts which would incriminate him. Such was the process of the ecclesiastical court, as opposed through two centuries—the inquisitorial method of putting the accused upon his oath in order to supply the lack of the required two witnesses. Such was the complaint of Lilburn and his fellow objectors, that he ought to be convicted by other evidence and not by his own forced confession upon oath." (Wigmore on Evidence, § 2263, pp. 378–379.)

See *Quinn* v. *United States,* 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed.2d 964 (1955); *Ullmann* v. *United States,* 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed.2d 511 (1956); *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

On the subject of the safeguards of the privilege, this Court used the following language in *Brown* v. *United States,* 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958):

> "Our problem is illumined by the situation of a defendant in a criminal case. If he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. '[H]e has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.' *Fitzpatrick* v. *United States,* 178 U.S. 304, 315, 44 L.Ed. 1078, 1083, 20 S.Ct. 944; and see *Reagan* v. *United States,* 157 U.S. 301, 304, 305, 39 L.Ed. 709–711, 15 S.Ct. 610. The

reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf. It is reasoning that controls the result of the case before us.

". . . .

"On the other hand, when a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. '[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.' *Walder* v. *United States,* 347 U.S. 62, 65, 98 L.Ed. 503, 507, 74 S.Ct. 354. The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination. [Footnote omitted.] Petitioner, as a party to

> the suit, was a voluntary witness. She could not take the stand to testify in her own behalf and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination." (2 L.Ed.2d at pp. 596–597.)

The policies behind the adoption of this rule are detailed in the *Griffin* opinion (*Griffin* v. *California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)) at 380 U.S. 615. In *Griffin,* the court states that the Fifth Amendment was framed with a due regard for those who might prefer to rely upon the presumption of innocence which the law gives to everyone, and who do not wish to be witnesses. The court points out that it is not everyone, however honest, who would, therefore, willingly be placed on the witness stand. The Fifth Amendment in tenderness to the weakness of those who might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the *failure* of the defendant in a criminal action *to request to be a witness* shall not create any presumption against him.

These reasons for forbidding comment upon the exercise of the defendant privilege have little relevance once the accused takes the stand and testifies. Moreover, the other arguments advanced in support of the privilege against self-incrimination also lose their force once the defendant decides to accept the advantages of testifying in his own defense. 8 Wigmore, *Evidence,* § 2276, p. 462; § 2251, pp. 295–318

(McNaughton Rev. 1961). To permit a defendant, who has waived his defendant privilege and elected to take the stand, to testify solely to those aspects of his case which are favorable to his cause without giving the prosecution the chance to explain, not only does not advance the purposes of the privilege, but it so distorts the trial picture presented to the jury that the balance of fairness is unconscionably tipped in favor of the defendant. Therefore, the overwhelming majority of both federal and state courts have adopted the rule that once the defendant waives his defendant privilege by taking the stand and testifying to matters relevant to the charge against him, the no-comment rule is no longer applicable.

(B) THE CALIFORNIA WAIVER RULE

California follows the general rules established in *Caminetti* and subsequent federal cases. In *People* v. *Ing,* 65 Cal.2d 603 [422 P.2d 590] (1967), decided the same day as the present case, the California Supreme Court held that a defendant, by testifying in his own behalf, waives his constitutional privilege against self-incrimination to the extent of the permissible scope of cross-examination (Pen. Code § 1323; *People* v. *Atchley,* 53 Cal.2d 160, 173–174 [346 P.2d 764] (1959); *People* v. *Arrighini,* 122 Cal. 121, 126 [54 P. 591] (1898); *People* v. *O'Brien,* 66 Cal. 602, 603 [6 P. 695] (1885); *People* v. *Withers,* 73 Cal.App. 2d 58, 60–61 [165 P.2d 945] (1946); see Witkin, Cal. Evidence (1958) pp. 510–511; McBaine, Cal. Evidence

Manual (1960) pp. 79–80.) Under California provisions cross-examination of a defendant is limited to "matters about which he was examined in chief" (Pen. Code § 1323).[6]

The factual matters in the present case relating to Counts III and IV and the collateral offense (Modern Variety Store robbery) were within the scope of permissible cross-examination. Where, as here, the petitioner takes the stand and in effect makes a general denial of the offenses charged in Counts I and II, the scope of cross-examination is very broad (*People* v. *Tarantino,* 45 Cal.2d 590 [290 P.2d 505] (1955); *People* v. *Zerillo,* 36 Cal.2d 222 [223 P.2d 223] (1950). The offenses charged in Counts III and IV and the collateral offense were relevant to show a common scheme or plan and would thus rebut petitioner's alibi testimony as to Counts I and II. Cross-examination as to these offenses would have been proper[7] (*Johnson* v. *United States,* 318 U.S. 189, 191, 195–196 (1943); *Ray* v. *United States,* 255 F.2d 473, 475 (4th Cir. 1958); *United States* v. *Bradley,* 152 F.2d 425, 426 (3rd Cir. 1945); *Ng Sing* v. *United States,* 8 F.2d 919, 920 (9th. Cir. 1926)).

In the *Tarantino* case, the defendant testified that he did not commit the crimes charged. The prosecution cross-examined the defendant as to other similar of-

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[6] See Appendix B attached.

[7] The trial court erroneously sustained an objection to cross-examination of petitioner directed to Counts III and IV upon the ground that the questions were beyond the scope of direct examination. No prejudice resulted since petitioner was the beneficiary of the error.

fenses to which he had not referred to in his testimony in chief. In rejecting a contention that this cross-examination was improper, the California Supreme Court stated: "The cross-examination here was directed primarily to matters implicit in Tarantino's general denial, i.e., his purpose, and motive, his general plan and scheme."

The reasoning of the California Supreme Court on this issue is as follows:

> "As we have seen, on direct examination defendant testified to an alibi with respect to counts 1 and 2 and thus in effect denied the offenses charged in those counts. Cross-examination as to the collateral offense, which disclosed a plan, pattern, and *modus operandi* similar in many respects to those charged, would have been proper. (*People* v. *Ing, supra, ante,* p. 612, and authorities cited therein.) Cross-examination as to the robberies charged in counts 3 and 4 likewise would have been proper. Those robberies, like the collateral robbery, disclosed a plan, pattern, and *modus operandi* similar in many respects to those charged in counts 1 and 2.
>
> "The fact that defendant was then on trial for the robberies charged in counts 3 and 4 does not preclude a determination that the waiver extends to those offenses. To hold otherwise would permit a defendant to withdraw from the crossfire of interrogation before the reliability of his testimony has been fully tested. It is also of importance that the reasons advanced for the privilege are decisively less persuasive when applied to disclosures requested after the accused has voluntarily taken

the stand. (See 8 Wigmore on Evidence (McNaughton rev. 1961) § 2276, p. 462.)" (*People* v. *Perez,* 65 Cal. 2d 615, at p. 621 [422 P.2d 597] (1967).)

(C) SINGLE TRIAL OF MULTIPLE CHARGES

Petitioner argues that if he were tried separately for each of these crimes he could pick and choose which crimes he wanted to testify to, and if he should choose not to take the stand with regard to a particular crime, no comment could be made upon his failure to testify. Thus, the argument continues, the prosecution is able to use a procedural device to strip from petitioner one of his basic constitutional rights. This argument is without merit.

Petitioner is correct in his assertion that if he were tried separately for each crime, he could selectively assert his right to take the witness stand and no comment could be made on his failure to take the stand under *Griffin* v. *California,* 380 U.S. 609 (1965). However, if petitioner were to choose in any single case not to testify, he would not have the important psychological advantage of having taken the stand which he had in the present case. Having elected not to testify at all, the jury would still be able to draw the natural inferences that it would normally draw even though no comment is made upon the defendant's failure to take the stand. Moreover, if the defendant chose not to take the stand, no confusion would arise in the minds of the jury as to why he did not discuss and was not cross-examined on critical evidence which was

introduced against him. In the present case, petitioner did take the stand and was thereby able to favorably impress the jury with his willingness to testify. To permit the defendant to gain this advantage, without allowing the People to comment not only on what he said but what he failed to say, gives the defendant an advantage he would not have in separate trials and which, in fairness to the prosecution, he should not be allowed to have.

Furthermore, petitioner's argument is premised on the fact that if he were given separate trials in the present case, he would have chosen not to testify with regard to Counts III and IV. Assuming petitioner would have used the same tactics in separate trials as he used in the combined trial, it is not at all clear that he would have chosen to remain off the stand when tried separately on Counts III and IV. To illustrate, if petitioner were tried separately on Count III, the crimes charged in Counts I, II, and IV would still be relevant to establishing his guilt of the closely related crime charged in Count III. These other crimes would be before the jury, and presumably, the defendant would be just as eager to explain his noninvolvement in Counts I and II in the separate trial as he was in the combined trial. Of course, if defendant took the stand in the separate trial of Count III or IV and testified to his noninvolvement in Counts I and II exclusively, we would be back to the same issue we have in the present case, assuming the prosecution

were to comment upon his failure to discuss the crime charged in Count III. Similarly, if petitioner received a separate trial on Count I or II (and assuming petitioner took the stand as he did here to give an alibi), the offenses contained in Counts III and IV would be relevant as collateral robberies to show a common scheme or plan. They would be within the scope of cross-examination, and comment upon petitioner's failure to deny or explain them would be proper.

It is submitted that the prosecution has not injured petitioner by joining the four charges of robbery for trial in a single accusatory pleading.

II. Assuming a Violation of the Griffin Rule as to Counts III and IV, the Error Was Harmless Beyond a Reasonable Doubt

This Court in *Chapman* v. *California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed.2d 705 (1967), in considering a violation of the *Griffin* rule held that not all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Rather, "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Two considerations are important in considering the issue of harmless error in this case. The comment in this case was not extensive as was the situation presented to the court in *Chapman.* (See also *Anderson* v. *Nelson,* --- U.S. ---, 36 L. Week 3381, 4/2/68; *Fontaine* v. *California,* --- U.S. ---, 36 L. Week 3389

(4/8/68).) The comment in this case certainly did not approach "the machinegun repetition" that existed in *Chapman*. Counsel for petitioner points to two instances where comment was made by the prosecution. The first is at line 13, page 457, to line 1, page 458, which relates to an attempted explanation by the prosecutor as to his arguments being limited by the scope of cross-examination. The second comment cited by counsel for petitioner at line 1, page 461, to line 17, page 462, deals in part with petitioner's failure to deny or explain evidence against him.[8]

Secondly, the inquiry as to harmless error must be considered in light of the fact that petitioner here, unlike the *Chapman* case, took the stand in his own behalf. It was petitioner who focused the jury's attention on his failure to deny or explain the evidence against him. As a result the jury, without any aid from the prosecutor or the court, would be more aware of the petitioner's failure to deny or explain relevant evidence against him. Furthermore, the unexplained evidence against the petitioner was clearly within his personal knowledge. The jury would therefore inevitably look to the petitioner for an explanation of the innuendo of this evidence, especially since he was on the stand discussing other aspects of the case. As Justice Harlan stated in his dissent in *Chapman* at 386 U.S. 55, the added impact of comment in this

[8] An additional brief comment was made at lines 3 to 5, RT 464.

situation would seem marginal at most. Moreover, the presence of the petitioner on the stand removed any possibility that the jury might be misled concerning the reasons why the defendant had refused to testify. This has been cited as one of the most prejudicial aspects of comment upon the failure to testify. *Johnson* v. *New Jersey,* 384 U.S. 719, 729 (1966).

Applying the above principles and considerations to the present case, and considering them in light of the general statements of the court in *Tehan* v. *Shott,* 382 U.S. 406, 416 (1966), that a violation of the no-comment rule does not affect the integrity of the fact finding process and creates no clear danger of convicting the innocent, the assumed violation of the *Griffin* rule was harmless beyond a reasonable doubt. The record here contains substantial, though circumstantial, evidence to support the jury's finding of guilt on Counts III and IV. The limited comment present in this case, together with the court's limiting instruction on the subject, when considered with the factor of the jury's independent analysis of the petitioner's failure in his testimony to explain incriminating circumstances, did not tip the scales against petitioner. The record supports the conclusion that any *Griffin* error was harmless beyond a reasonable doubt.

CONCLUSION

It is respectfully submitted that the judgment of the state court should be affirmed.

Respectfully submitted,

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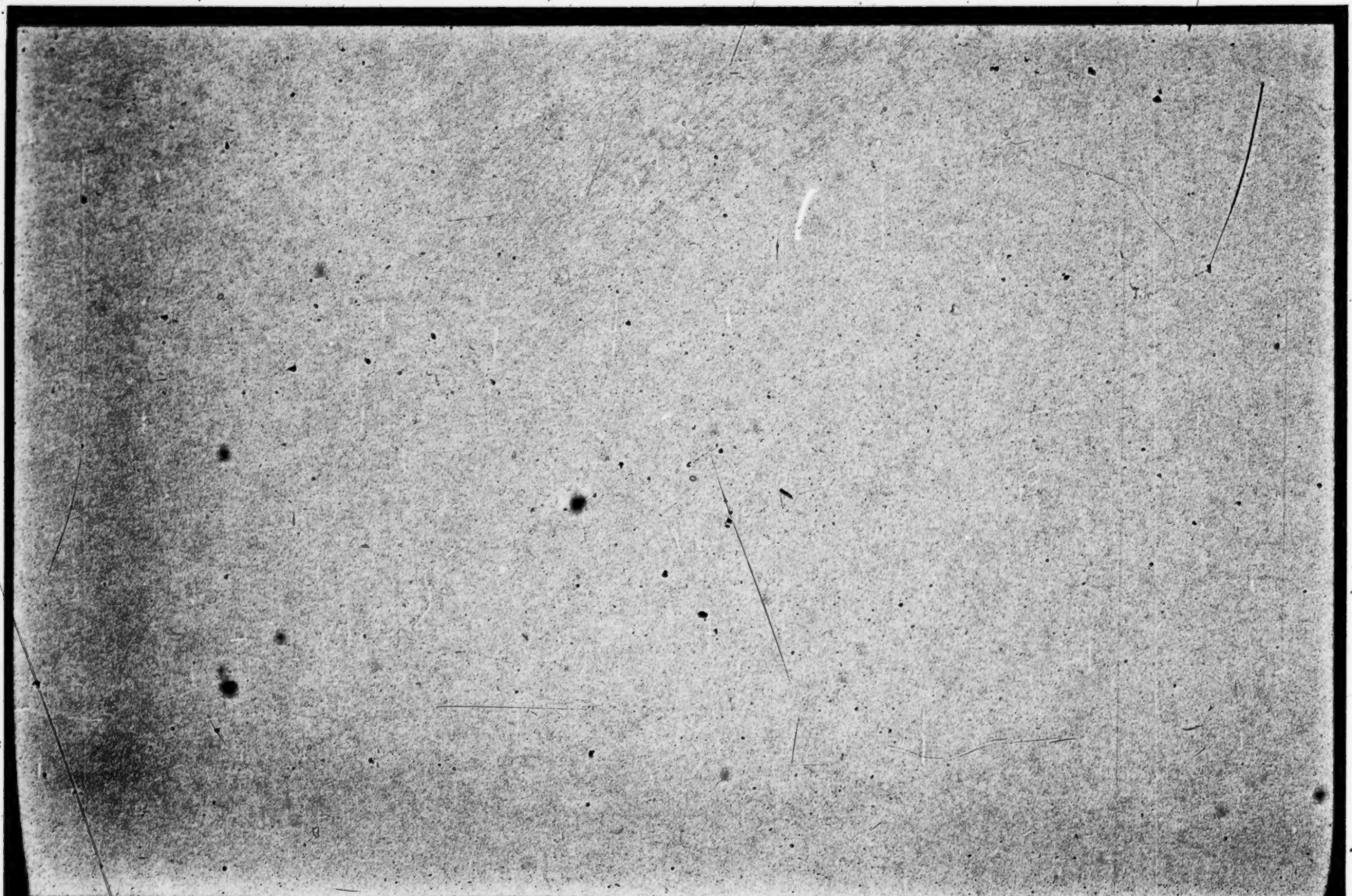

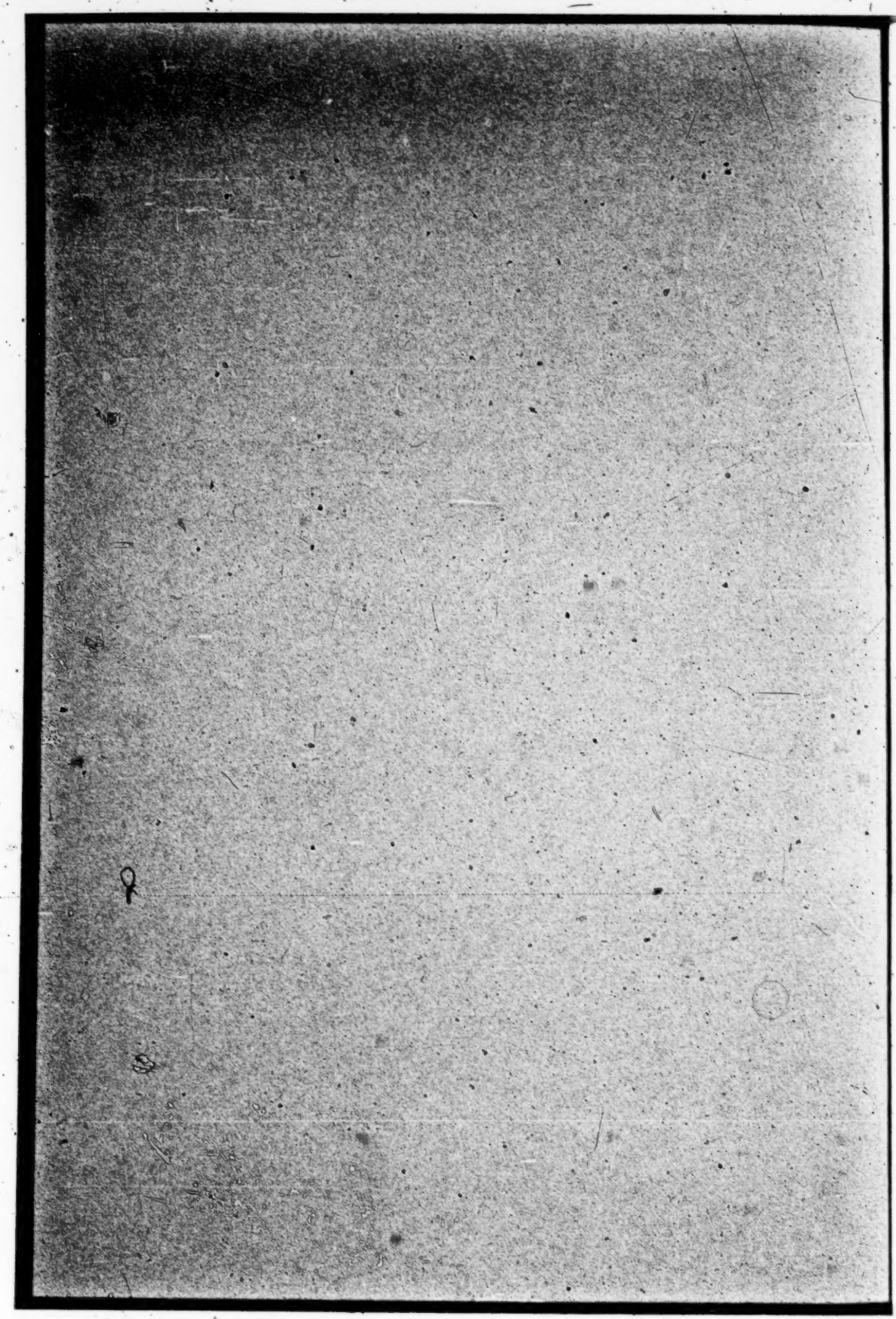

APPENDIX A

SECTION 1323

Defendant; exemption from compulsion; scope of cross-examination; comment on failure to explain or deny adverse evidence or facts

A defendant in a criminal action or proceeding can not be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel. (Enacted 1872. As amended Code Am.1873–74, c. 614, p. 451, § 79; Stats.1935, c. 718, p. 1942, § 3.)

APPENDIX B

[1] The instruction read: "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt."

People v. *Perez,* 65 Cal.2d 615, 620, fn. 1.

APPENDIX C

SEC. 13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicides when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. [Constitution of 1849, Art. I, Sec. 8, revised 1879; amended November 6, 1934]

California Constitution, Article 1, Section 13

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PEREZ *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 39. Argued November 14, 1968.—Decided May 26, 1969.

65 Cal. 2d 615, 422 P. 2d 597, dismissed.

Peter G. Fetros, by appointment of the Court, 393 U. S. 812, argued the cause and filed a brief for petitioner.

Edsel W. Haws, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Thomas C. Lynch*, Attorney General, and *Doris H. Maier*, Assistant Attorney General.

PER CURIAM.

The writ is dismissed as improvidently granted.

MR. JUSTICE DOUGLAS dissents from the dismissal of the writ.